year triggered by the pandemic and the related impact on bar exams and placements. I think she now hopes to experience what she has always appreciated as a once-in-a-lifetime opportunity

In my judgment, Hannah exhibits maturity beyond her years, good judgment, an excellent intellect, strong writing skills, an even-keeled temperament, and superior interpersonal skills. I realize that you enjoy a deep pool of qualified applicants. I recommend Hannah to you highly and without qualification. If I can provide any additional information, please feel free to contact me.

Sincerely,

Patricia A. O'Hara
Professor Emerita of Law

Patricia O_Hara - pohara1@nd.edu - 574-631-5344

HANNAH E. WALSH
walsh.hannah29@gmail.com | (972) 400–7812 | 2422 Loving Ave., Dallas, Texas 75214
Texas State Bar No. 24125717 | Admitted in N.D., W.D., E.D., & S.D. Texas

WRITING SAMPLE

Below is an excerpt from a motion to compel filed in the U.S. Bankruptcy Court for the Northern District of Texas on behalf of Defendants, a landlord and its bankruptcy consultant, against non-party Trustee. By way of background, the Plaintiff (the lessee) commenced an adversary proceeding against Defendants after filing for chapter 11 bankruptcy, alleging that Defendants had conspired to commit various business torts against Plaintiff, breached the parties' non-disclosure agreement, and caused Plaintiff's financial decline. Plaintiff also sought reformation of the parties' ground lease. Prior to the motion, the Court rejected an attempt by Trustee, Plaintiff's bond trustee and largest creditor, to intervene in the matter. Over the course of discovery, Trustee and Plaintiff withheld hundreds of communications with one another and with Plaintiff's corporate parent, Parent Co., under the guise of common interest privilege. After a reply and supplemental briefing in support of the motion, the Court ultimately issued an opinion and order granting Defendant's Motion to Compel Trustee's Compliance with Subpoena.

This writing sample contains only my own writing and research. It does not reflect the version of the brief ultimately filed in this matter after my colleagues offered minor edits and the parties narrowed the scope of the dispute during pre-filing conferences. The party names have been removed, as have any references to confidential information.

I. INTRODUCTION

Not that long ago, Trustee attempted to intervene in this lawsuit, seeking to assert "distinct" and "unique" claims. But now, Trustee is improperly withholding vast categories of responsive information under blanket assertions of common interest privilege between it and Plaintiff. Simply put, that limited privilege has no application to those communications. In fact, Trustee's legal interests in this bankruptcy, as Plaintiff's largest creditor, are adverse to Plaintiff's legal interests. That Plaintiff and Trustee would both benefit financially if Plaintiff were to prevail on its baseless claims against Defendants does not shroud their communications in privilege. Defendants and this Court are entitled to see the relevant, critical evidence in Trustee's possession.

Trustee's obstructionist tactics do not stop there. Despite its previous acknowledgements of the import of certain facts in this case, Trustee now asserts disingenuous blanket relevancy objections to Defendants' most basic requests. Trustee similarly refuses to produce relevant documents based on an improper position that simply because documents on the same topic are available elsewhere, Trustee need not produce the responsive documents in its possession.

Trustee's objections have no legal or factual basis. Those improper objections should be overruled and Trustee should be compelled to produce all documents responsive to Defendants' requests.

II. ARGUMENTS AND AUTHORITIES

A. Legal Standard.

The Federal Rules of Civil Procedure dictate that "any party to a civil action is entitled to all information relevant to the subject matter of the action before the court unless such information is privileged." *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 820 (5th Cir. 2004) (quoting *Wehling v. ColTrusteeia Broad. Sys.,* 608 F.2d 1084, 1086 (5th Cir. 1979)). To the extent a party resists discovery on the basis of privilege, the burden falls on the party invoking the privilege to show that those

protections apply. *Employment Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017). Blanket claims of privilege are disfavored, and a claim of privilege must be specifically asserted with respect to particular documents. Fed. R. Civ. P. 26(b)(5); *Nguyen v. Excel Corp.*, 197 F.3d 200, 206–07 (5th Cir. 1999). Moreover, the party invoking the privilege must prove preliminary facts to establish that the matter is eligible for privilege protection. *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 n.7 (5th Cir. 2001).

Trustee has utterly failed to satisfy its discovery obligations. The information sought by Defendants is not privileged and is relevant to Plaintiff's claims (and claims Trustee sought to assert in its Motion to Intervene)—particularly to whether Defendants' alleged conduct caused Plaintiff's insolvency, as Plaintiff alleges. Trustee has no legitimate basis to withhold its communications with Plaintiff.

B. Trustee does not have common interest privilege with Plaintiff or Parent Co.

Trustee refuses to produce any communications with Plaintiff after September 1, 2021 under the guise of common interest privilege based on a supposed "unity of interests." That is nonsensical—in Trustee's own words, "[t]he Trustee's interest is distinct from the Debtor[s]." Trustee's Mot. for Leave to Intervene ¶ 26; *see also id.* at ¶ 27 (stating again that "Trustee's claims in the Intervenor Complaint" are "distinct from the Debtor['s]").

Common interest privilege requires more than an aligned commercial interest. The privilege only applies in two limited circumstances: (1) when communications are made between co-defendants in actual litigation and their counsel, or (2) when communications are made between potential co-defendants and their counsel. *In re Santa Fe*, 272 F.3d at 711. In order to assert the privilege, the parties must share an *identical* legal interest. *See id.* at 711–12.

Trustee cannot satisfy its burden on any necessary element of common interest privilege as to its communications with Plaintiff.

1. Trustee fails to meet any of the requirements for common interest privilege with Plaintiff or Parent Co.

Plaintiff and Trustee have already admitted that they have distinct legal interests in this litigation. That fact alone renders common interest privilege inapplicable, so the Court need not go further. But even ignoring the blatantly contradictory positions Trustee has taken before this Court, Trustee's assertion of privilege fails to meet any requirements for common interest privilege with Plaintiff.

i. Common interest privilege does not apply to communications between a litigant and a non-party.

Common interest privilege is narrow. Indeed, the Fifth Circuit has explicitly stated that, because the common interest doctrine is "an obstacle to truth seeking," it is to be "construed narrowly to effectuate necessary consultation between legal advisers and clients." *In re Santa Fe*, 272 F.3d at 710 (internal quotation marks omitted). The privilege only applies between actual or potential co-defendants. But the mere theoretical potential for a party to be later named as a co-defendant is insufficient to trigger the protections of the privilege. *See, e.g.*, *F.T.C. v. Think All Pub.*, L.L.C., 2008 WL 687456, at *1 (E.D. Tex. Mar. 11, 2008) (rejecting the argument that "all that matters is that there is the potential for an action to have been brought" against the third party involving issues common to both the instant and hypothetical lawsuits as "contrary to the precedent in this Circuit" because "[u]nder this view, the joint defense doctrine would potentially be as expansive as the imagination of the lawyer who asserts it.").

Trustee is neither an actual nor potential defendant. Indeed, Trustee is not a party to this litigation at all, much less a party aligned on the same side of the litigation as Debtors.[1] Rather, Trustee

[1] The overwhelming majority of case law surrounding the assertion a common interest privilege applies between co-*defendants*, not putative co-plaintiffs. *Stanley v. Trinchard*, No. CIV.A. 02–1235, 2005 WL 230938, at *1 (E.D. La. Jan. 27, 2005) ("[I]t is questionable in the Fifth Circuit whether the common interest doctrine extends to plaintiffs."). But the Court need not reach this issue, as Trustee is not even a potential party to this lawsuit and thus the analysis can and should stop there.

is Plaintiff's largest creditor. Thus at the outset, Plaintiff cannot have common interest with non-party Trustee. *See In re Santa Fe*, 272 F.3d at 710. Moreover, Parent Co. is not a party. Yet, Trustee has claimed to have a common legal interest with Parent Co. *See, e.g.*, Ex. A, Trustee's Privilege Log at Entry No. 192. Trustee has not offered any support for its position that a non-party can assert the common interest privilege in the Fifth Circuit, much less that a non-party can assert common interest privilege as to communications with other non-parties.

Even if Trustee claims it could have contemplated being sued by Defendants at some point (it cannot), the mere potential for entities to be engaged in hypothetical future litigation is insufficient to trigger the protections of the privilege. *See Think All Pub., L.L.C.*, 2008 WL 687456, at *1. As the court in *Think All Publishing* recognized, if the mere potential for Trustee to be named as a defendant in a hypothetical action were enough to extend the common interest doctrine, its bounds would be effectively limitless. *Id.* To quote Plaintiff, "[m]erely consulting" with a third-party is not sufficient to invoke the common interest privilege. *See* Pl's Mot. to Compel at 8. Any argument that the common interest exception should be expanded because Plaintiff and Trustee could, in some theoretical universe, be named as co-defendants must fail.

Finally, "[t]he 'common interest' doctrine is not an independent privilege. Rather, it is a common law extension of the attorney-client privilege that serves to protect privileged communications that are shared with a third party who has a common legal interest with respect to the subject matter of the communication." *Lanelogic, Inc. v. Great Am. Spirit Ins. Co.*, No. 3-08-CV-1164-BD, 2010 WL 1839294, at *4 (N.D. Tex. May 6, 2010) (citations omitted); *see also In re Santa Fe Intern. Corp.*, 272 F.3d at 710 (defining the "'common legal interest' extension of the attorney-client privilege"). Accordingly, the privilege only applies to communications *with counsel*. To the extent that Trustee withholds communications on the basis of common interest privilege that do not include

counsel, (see, for example, Ex. A at Entry Nos. 3–8), such documents are not privileged and must be produced.

ii. There is no common legal interest between Plaintiff and Trustee.

A common commercial interest in the outcome of the litigation is insufficient for common interest privilege to attach; the legal interests must be *legal* and they must be *identical*. *See In re Santa Fe*, 272 F.3d at 711–12; *Ferko v. Nat'l Ass'n For Stock Car Auto Racing, Inc.*, 219 F.R.D. 403, 406 n.1 (E.D. Tex. 2003) ("A commercial interest, however, does not trigger the common interest doctrine."). As Plaintiff itself admits: "A shared rooting interest in the successful outcome of a case . . . is not a common *legal* interest." Pl's Mot. to Compel at 10 (collecting authority) (internal quotation marks omitted). In other words, the theory that Trustee stands to financially benefit if Plaintiff prevails on its baseless adversary claims does not, standing alone, cloak communications between Trustee and Plaintiff with any privilege. Whatever Trustee's and Plaintiff's common financial objective may be, it is not a privileged one.

Trustee's and Plaintiff's interests are not just divergent—the very nature of their debtor-creditor relationship is antithetical to a "common legal interest." This is especially true in the context of bankruptcy. Indeed, the limited documents Plaintiff was willing to produce prove there is no common interest. Most obviously, on October 18, 2021—weeks into the alleged common interest period—Trustee sent a Notice of Default to Debtor and Parent Co. *See* Ex. B, Notice of Default Letter.

Because Trustee and Plaintiff do not have an identical legal interest in common, Trustee's common interest privilege assertions regarding communications with Plaintiff should be overruled.

iii. Trustee does not have a joint defense agreement with either Plaintiff or Parent Co.

Plaintiff and Trustee admittedly have not entered a joint defense agreement (or any other agreement related to this litigation) and thus, the privilege cannot apply. *See In re Santa Fe*, 272 F.3d

at 709. Although a formal written agreement is not required to assert common interest, the Fifth Circuit has held that "the age of the communications" pre-dating the litigation coupled with "the lack of evidence of any common defense agreement . . . ma[k]e a strong case against the common interest privilege claim." *Id.; see also Hall Patent Grp., LLC v. Indus. Noise Control Corp.*, No. 3:05-CV-661-M, 2006 WL 8437278, at *3 (N.D. Tex. Sept. 19, 2006) ("Agreements to engage in a joint defense may be written or oral, but parties relying on an oral agreement run the risk that the Court can not determine when or if an agreement was reached."). Here, counsel for both Plaintiff and Trustee conceded that there is no formal agreement memorializing or otherwise attempting to establish a common legal interest among Plaintiff, Trustee, and/or Parent Co.[2] That lack of formal agreement directly undercuts the claim that somehow Trustee and Plaintiff shared a common interest months before Defendants' conduct at issue or Plaintiff's eventual bankruptcy.

2. No palpable threat of litigation existed in September 2021.

Even if Trustee's communications with Plaintiff or Parent Co. were eligible for common interest privilege for some period of time—which they are not—the timeframe of Trustee's common interest assertion is unsupportable. The Fifth Circuit case law is clear: for communications between "potential" co-defendants to be covered by the common interest doctrine, "there must be a *palpable threat* of litigation *at the time of the communication*, rather than a mere awareness that one's questionable conduct might some day result in litigation. . . ." *In re Santa Fe*, 272 F.3d at 711 (emphasis added); *see also United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) ("Communications between

[2] Interestingly, Trustee represented that it *does* have a formal joint representation agreement between it and the bondholders, indicating that Trustee recognizes the significance of a written agreement for privilege assertions. Further, the fact that Trustee has aligned itself with the bondholders undercuts any potential common interest with Plaintiff, as the interest shared between trustee and bondholder is adverse by nature to Plaintiff and certainly not relevant to the issues in this adversary proceeding. *See, e.g.*, *Lord Abbett Mun. Income Fund, Inc. v. Asami*, No. C-12-03694 DMR, 2013 WL 5609333, at *4 (N.D. Cal. Oct. 11, 2013) ("It is undisputed that [bondholder] and [trustee] have a common interest in ensuring that the bondholders are repaid under the Indenture, and therefore the doctrine applies to protect communications related to [the debtor]'s default and the bankruptcy proceeding. However, [bondholder] has not explained why [trustee] has an interest in this action, which has nothing to do with repayment of the bonds.").

potential codefendants and their counsel are only protected if there is a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation.") (internal quotation marks omitted)).

Here, Trustee claims that its common interest with Plaintiff stems from a "unity of interests that arose between the Trustee and Plaintiff on or about September 1, 2021 with respect to their joint effort to protect their mutual interests related to" two different aspects of this litigation: (1) "Debtor's filing for bankruptcy," and (2) "from Defendants' tortious conduct and contractual breaches alleged in the Complaint." Trustee's Resp. to Subpoena, at 3. Neither position is tenable.

i. Any purported "unity of interests" relating to Plaintiff's bankruptcy beginning in September 2021 is incompatible with Plaintiff's Adversary Complaint.

If it is true that Plaintiff's ultimate financial decline and bankruptcy was palpable in September 2021, Trustee's and Plaintiff's claimed common interest effectively nullifies this entire adversary proceeding. The Fifth Circuit has made clear that "a cognizable common legal interest does not exist if a group of individuals seeks legal counsel to avoid conduct that might lead to litigation, but rather only if they request advice to prepare for future litigation." *Newell*, 315 F.3d at 525 (internal quotation marks omitted). So, for common interest to apply to Trustee and Plaintiff's communications beginning in September 2021 "related to [Plaintiff's] filing for bankruptcy," then the inevitability of Plaintiff's bankruptcy must have already been "palpable" and Trustee was merely assisting in "preparation" of the bankruptcy filing. *See id.* But if Plaintiff's bankruptcy was imminent in September, as its privilege assertion would require, Defendants' conduct, which occurred several months later, could not have caused Plaintiff's bankruptcy, as Plaintiff alleges in its Adversary Complaint.

ii. The alleged conduct complained of in the Adversary Proceeding did not occur in September.

In addition to lacking common interest privilege regarding the eventual bankruptcy filing by Plaintiff, the supposed disclosures and actions alleged in the Adversary Complaint began around early

January—at least *four months* later than the "common interest" purportedly arose. (And if a common scheme to pursue claims against a property owner in Debtor's then-unavoidable bankruptcy was Plaintiff's and Trustee's intent by September 2021, all the more reason this Court and Defendants are entitled to their communications concocting that scheme.) Trustee's assertion of common interest privilege months before the facts in dispute even occurred is unsupportable and borders on absurd.

Trustee's privilege assertion over all communications with Plaintiff and Parent Co. categorically fails. The purported starting date for that supposed privilege only further underscores the need to discover that evidence. Communications and information exchanged between Trustee and Plaintiff related to the issues in this ligation are not privileged and must be produced**.**

C. Trustee's relevancy objections are irreconcilable with Plaintiff's Adversary Complaint and Proposed Plan.

Trustee insists that the majority of Defendants' Requests are "not relevant to the Claims and/or defenses of any party." *See, e.g.,* Trustee's Resp. to Subpoena Nos. 1, 2, 3, 5, 6, 5A, 6A, 8, 10, 12, 14, and 15. For example, Trustee objected to Defendants' Request No. 2, which seeks "All Documents and Communications concerning the Lease or proposals to modify the Lease," on the grounds that:

> In the Adversary Proceeding, the Debtors seek reformation of the Lease on a number of bases, including mutual mistake. Communications between the Trustee and anyone other than the Debtors or the Defendants regarding the Lease are, therefore, not relevant to the Claims or defense of any party, extremely overbroad and not reasonably calculated to lead to the discovery of admissible evidence. Should it be necessary to explain further, proposals to modify the Lease are also not relevant to whether there was a mistake of fact between the parties to the Lease at the time the Lease was signed.

Id. at 5. Of course, that is not true—for example, any communications reflecting Plaintiff's understanding of the validity of the Lease or its ability to satisfy its obligations thereunder would be

highly probative of the veracity of Plaintiff's "mutual mistake" claim and whether Defendants could have caused Plaintiff's alleged damages.

Similarly, Trustee refused to produce *any* documents responsive to Defendants' Request No. 8, which seeks "All Documents and Communications concerning the Bankruptcy or [Plaintiff's] anticipated or possible filing of bankruptcy." Again, Trustee largely based its objection on relevancy grounds:

> [In]formation concerning the Bankruptcy generally, does not relate to the Claims or defenses asserted in the Adversary Proceeding. . . . Further, communications that the Trustee had with regulatory agencies, the Office of Texas Attorney General, media outlets, and bond rating agencies concerning the Bankruptcy are plainly not relevant to whether ***Defendants*** breached their contracts, tortiously interfered with Debtors' existing or prospective contracts, engaged in a civil conspiracy, or other conduct alleged in the Complaint.

Id. at 10–11. But Plaintiff's communications about its financial health and projections, including as they relate to the bonds, are foundational to its claims. Plaintiff alleges that Defendants' conduct "substantially contributed to [Plaintiff] having to file for chapter 11 protection." Adv. Compl. at ¶ 69; *see also id.* at ¶¶ 80, 87, 96, 104. Trustee's communications with Plaintiff regarding Plaintiff's financial status prior to the conduct complained of in the Adversary Complaint are directly relevant to this lawsuit.

Trustee apparently misconstrues "relevance" to mean only those documents absolutely necessary to support an element of Plaintiff's theory of its claims. Trustee's myopic view of its discovery obligations is inconsistent with the Federal Rules. Trustee wholly ignores, for example, information that will support defenses and disprove Plaintiff's claims and purported damages. "Relevant information encompasses 'any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D. Tex. 2005) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). As this Court knows, the Lease and modification to it, Plaintiff's bonds, and Plaintiff's financial decline

into bankruptcy are at the heart of this lawsuit, the responsive documents' relevance cannot be seriously disputed. Thus, Trustee's blanket relevancy objections must be overruled.

D. Whether Plaintiff also possesses certain documents is irrelevant to Trustee's obligations to comply with the Subpoena.

It is well-established that the party objecting to discovery on the basis of undue burden "has the burden of proof to demonstrate 'that compliance with the subpoena would be unreasonable and oppressive.'" *Nasufi v. King Cable, Inc.*, No. 3:15-cv-3273-B, 2017 WL 3334110, at *5 (N.D. Tex. Aug. 4, 2017) (quoting *Wiwa*, 392 F. 3d at 818). Specifically, the "party opposing discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *Id.*

Trustee contends that several of Defendants' Requests are "unduly burdensome" because such information "is readily available from [Plaintiff]" or available "on the EMMA website." Trustee's argument fails for several reasons.

First, the documents sought in these Requests are not in Plaintiff's possession or otherwise publicly available. For example, the requests seek both *internal* Trustee documents and communications, as well as communications with *third parties*. Yet Trustee refuses to produce *any* responsive documents to those requests because of Trustee's belief that the same documents are "readily available" from other sources. That is nonsensical. Plaintiff would not possess any responsive communications between Trustee and the bondholders, Texas regulatory agencies, media outlets, or other third parties. Nor would Plaintiff be in possession of any of Trustee's internal communications, analyses, or documents regarding Plaintiff's financial condition.

Second, the documents requested from Trustee are highly relevant. For example, Plaintiff claims that Defendants' alleged actions "substantially contributed to [Plaintiff] having to file for chapter 11 protection." *See* Adv. Compl. ¶¶ 69, 80, 87, 96. As Trustee of well over $100 million worth of bonds, Trustee likely conducted its own analyses of Plaintiff's financial condition since assuming

the role of Trustee in 2017. Therefore, Defendants submitted discovery requests to Trustee for its "Documents and Communications concerning [Plaintiff's] Restructuring or possible Restructuring"; "Documents and Communications concerning the Historical Financial Condition"; and "Documents and Communications between You and any individual or entity with a financial interest in the Bonds concerning [Plaintiff] or the Historical Financial Condition." Trustee's own research and communications regarding Plaintiff's financial condition prior to the alleged conduct of Defendants is crucial to Plaintiff's allegation that Defendants "substantially contributed" to its insolvency. Trustee cannot be permitted to refuse to produce such highly relevant information because Plaintiff may be in possession of its *own* documents concerning the same topics.

Plaintiff also alleges that there was a "mutual mistake" regarding the Lease, and that "[a]s a result of the parties' mutual mistake, the Lease should be reformed to eliminate any and all provisions therein . . . providing [Landlord] any direct or indirect right to assume [Plaintiff's] Residency Agreements with the Residents, terminate such agreements without the consent of such Residents, or otherwise evict the Residents." *See* Adv. Compl. ¶ 120. So, Defendants requested documents from Trustee pertaining to the Lease and its analyses thereof. Trustee again objected to this request in part because the documents "are readily available from Plaintiff." All of those documents, however, would certainly be relevant to Plaintiff's claim of mutual mistake in the interpretation of the Lease and the rights therein. Just because Plaintiff may have its own documents concerning the Lease or its finances does not give Trustee grounds to refuse to produce responsive documents.

Third, Defendants cannot and should not have to rely exclusively on Plaintiff to produce all of the critical documents requested through the Subpoena. There is no universal requirement that a party must first seek documents from an opposing party. *See Nasufi*, 2017 WL 3334110, at *7 (holding that party should not "be required to further pursue the subpoenaed material and information" from the opposing party before seeking it from a non-party); *see also Med. Tech., Inc. v. Breg, Inc.*, 2010 WL

3734719, at *4 (E.D. Pa. Sept. 21, 2010) (subpoena to non-party was appropriate "not only to supplement [opposing party's] production but also to test the veracity of [the opposing party's] assertions that they have produced all the documents they are required to produce"). And, Trustee has failed to articulate with specificity why producing responsive documents would impose such an undue burden on Trustee as to justify depriving Defendants of such information.

For the foregoing reasons, Trustee's objections based on the availability of documents elsewhere should be overruled.

Applicant Details

First Name	**Sarah**
Last Name	**Wang**
Citizenship Status	**U. S. Citizen**
Email Address	**swang12@uchicago.edu**
Address	**Address** Street **6206 S. Woodlawn Ave., Apt. 1N** City **Chicago** State/Territory **Illinois** Zip **60637** Country **United States**
Contact Phone Number	**7325994133**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rappaport, John
jrappaport@uchicago.edu
773-834-7194
Davidson, Adam
davidsona@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

6206 S. Woodlawn Avenue, Apt. 1N
Chicago, IL 60637
732-599-4133

June 10, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez:

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term. As an aspiring litigator, a clerkship with your chambers would be an excellent opportunity to refine my legal research and writing skills and to develop a deeper understanding of the litigation process. Moreover, I have a special interest in clerking in Pennsylvania. I grew up in New Jersey and I would welcome the opportunity to clerk in a state close to home.

I am confident that I would contribute meaningfully to the Court's work. This year, as a staffer for the *University of Chicago Law Review*, I researched several different fields of law to prepare detailed topic analyses for other students' comments. I also refined my legal writing skills by drafting a comment about the status of Native American sovereignty in the wake of recent Supreme Court decisions. Last summer, as a legal intern for the Chicago Appleseed Center for Fair Courts, I prepared a memorandum regarding a circuit split over immigrants' rights to periodic bond hearings. These experiences have trained me to think and write clearly about nuanced legal questions.

A resume, transcript, and writing sample are enclosed. Spring Quarter 2023 grades for paper classes have not been posted yet, and I will provide an updated transcript when grades are posted. Letters of recommendation from Professors Davidson and Rappaport will arrive under separate cover. Should you require additional information, please do not hesitate to let me know.

Sincerely,

/s/ *Sarah Wang*

Sarah Wang
Enclosures

SARAH WANG

6206 S. Woodlawn Avenue, Apt. 1N, Chicago, IL 60637 • (732) 599-4133 • swang12@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, Illinois
Juris Doctor, expected June 2024
Journal: *The University of Chicago Law Review*, Staff Member
Activities: Immigration Law Society; Public Interest Law Society

The University of Chicago, Chicago, Illinois
Bachelor of Arts in Global Studies and Near Eastern Languages and Civilizations, with Honors, June 2019
Honors: Dean's List, Phi Beta Kappa
Activities: Sirat (Muslim community organization), ESL Class Coordinator for Syrian refugees; EUChicago (EU policy think tank), Researcher; Emancipation of North Koreans, Student Teacher; *The Chicago Maroon*, Copy Editor
Thesis: *Nativist "Universalism": Syrian Refugees and the EU's Exclusionary Human Rights*

EXPERIENCE

Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, Illinois
Summer Associate, Summer 2023

Chicago Appleseed Center for Fair Courts, Chicago, Illinois
Legal Intern, June 2022 – July 2022

- Developed blueprint for a judicial evaluation program to aid in voter education, judicial accountability, and identification of injustices in the Cook County legal system
- Created survey for immigration practitioners to identify structural issues within immigration courts
- Authored editorial advocating for expanded use of judicial evaluations and proposal for law firms regarding pro bono immigration policy project

The University of Chicago Law School, Chicago, Illinois
Research Assistant to Professor Adam Chilton, August 2021 – September 2021

- Reviewed and coded bilateral labor agreements for provisions identified as best practices by the International Labor Organization

BDO, Washington, District of Columbia
Transfer Pricing Associate, July 2019 – May 2021

- Engaged in legal and economic research to support intercompany transactions between entities of multinational corporations
- Drafted documentation reports containing industry analysis and economic analysis of financial data demonstrating the arm's length nature of intercompany transactions

Chicago Project on Security and Threats, Chicago, Illinois
Research Associate, September 2018 – June 2019

- Researched recruitment strategies and political motives of insurgent groups to aid in production of published reports

PUBLICATION

Wang, S. (2019). The Stability Maintenance Regime in Xinjiang. *The Chicago Journal of Foreign Policy, 3,* 17-25.

LANGUAGES

Mandarin (professional proficiency)
Modern Standard Arabic (limited proficiency)

THE UNIVERSITY OF CHICAGO

Name: Sarah Wang
Student ID: 10458318

University of Chicago Law School

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/15/2019
Degree Honors: With General Honors
Global Studies (B.A.) With Honors
Near Eastern Languages and Civilizations (B.A.) With Honors

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

John P. Stevens High School
Edison, New Jersey
Diploma 2015

University of Chicago
Chicago, Illinois
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	178
LAWS	30211	Civil Procedure William Hubbard	4	4	181
LAWS	30611	Torts Saul Levmore	4	4	181
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	182

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	182
LAWS	30411	Property Thomas Gallanis Jr	4	4	181
LAWS	30511	Contracts Bridget Fahey	4	4	177
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	182

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Adam Davidson	2	2	182
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	179
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	180
LAWS	43220	Critical Race Studies William Hubbard	3	3	178
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	176

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	43200	Immigration Law Amber Hallett	3	3	179
LAWS	43228	Local Government Law Lee Fennell	3	3	177
LAWS	53464	Public International Law Mary OConnell	3	3	177
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 06/10/2023

THE UNIVERSITY OF CHICAGO

Name: Sarah Wang
Student ID: 10458318

University of Chicago Law School

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Geoffrey Stone	3	3	177
LAWS	43234	Bankruptcy and Reorganization: The Federal Bankruptcy Code Anthony Casey	3	3	179
LAWS	43267	American Legal History, 1607-1870: Colonies to Reconstruction Alison LaCroix	3	3	182
LAWS	46101	Administrative Law David A Strauss	3	3	179
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	181
LAWS	43269	Foreign Relations Law Curtis Bradley	3	3	182
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	182
LAWS	53456	Comparative Race, Ethnicity and Constitutional Design Thomas Ginsburg	3	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

End of University of Chicago Law School


THE UNIVERSITY OF
CHICAGO

John Rappaport
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jrappaport@uchicago.edu | 773-834-7194

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Sarah Wang, a member of the University of Chicago Law Review and the Law School's Class of 2024, is applying for a clerkship in your chambers. Sarah's taken two of my classes, earning a pair of solid As. She has two years of work experience under her belt. And she's warm, humble, and dedicated to public interest work. It's my pleasure to recommend her to you.

Sarah was assigned to my Criminal Law course during her 1L year. I try to have lunch with all the students at some point, and I remember getting to know Sarah on that occasion. She struck me as reflective and modest, almost self-effacing. She's quite bright and curious but still very much trying to figure out what she thinks about the world, or at least about the issues we discussed. (To be clear, I view this as a feature, not a bug!) She was quiet in class but delivered at the quarter's end, writing a fine exam that earned her a 182 in the course—a solid A on Chicago's 186-point grading scale. This past quarter, Sarah took my Evidence class and got a 181, another solid A. Across both these quarters—and some in between—Sarah stopped by my office occasionally to talk about law. She didn't come to office hours because, I suspect, she thought her questions weren't sufficiently "class-related." Indeed, Sarah's inquiries were probing and cross-cutting. She seems like the type of person who ruminates on problems long after others have moved on. I think she's great.

Sarah grew up in Edison, New Jersey, a suburb of New York City. Her parents immigrated from China a few years before she was born. For the first dozen years or so, while her parents worked to establish themselves in the United States, Sarah was raised primarily by her paternal grandmother, a Chinese farmer who spoke no English. In fact, Sarah had so little exposure to English early on that she was enrolled in ESL classes until sixth grade. Around the time Sarah started high school, her grandmother moved back to China; her father also moved to Hong Kong for work, leaving Sarah alone with her mother, a contractor who worked seven days a week. Their time together revolved around her mother's business—countless trips to Home Depot and hours minding the hardwood and cabinet store. Sarah provided translation services, emailing customers, filling out contracts, and helping her mother—whose English was rudimentary—navigate restaurants and airports. Sarah's escapes during these years were art, novels, and piano.

Sarah came to college in Chicago with little sense of direction. The next four years were transformative, as she gained awareness of—and developed concern about—social inequality along multiple dimensions. Meanwhile, the 2016 presidential election and the national conversation around Executive Order 13769 (the so-called "Muslim ban") sharpened Sarah's identity as a child of recent immigrants. She opted to major in Global Studies and Near Eastern Languages and Civilizations. She mastered enough Arabic to volunteer with Syrian refugees in Hyde Park, assisting with translation work and teaching English lessons.

When Sarah graduated, she faced strong familial pressure to realize a financial return on her educational investments. She found work as a transfer pricing associate at BDO, an international accounting company. There were aspects of the work that Sarah enjoyed but, on the whole, she found it uninspiring. She kept thinking about the volunteer work she'd done in college, and how she could make a living out of it. That line of thinking eventually led her to law school. Back at UChicago, Sarah's active in the Public Interest Law Society and the Immigration Law Society, as well as the Law School's flagship law review.

Having taken the time to consider her options carefully, my guess is that Sarah will stay on her chosen path and cultivate a career in immigration law. Before that, she'll be an able law clerk for a fortunate federal judge. Sarah will get on easily with co-clerks and court and chambers staff; she's not one to make waves. If anything, my hope is that the clerkship experience will help her become more assertive. Sarah has a sharp mind and a big heart, and I wish for her the self-confidence to put those strengths to full effect.

I hope you'll take the opportunity to interview Sarah. In the meantime, if you have any questions about her candidacy, please do not hesitate to reach out to me.

Sincerely,

John Rappaport

Adam Davidson
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
davidsona@uchicago.edu | 773-834-1473

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to recommend Sarah Wang for a clerkship in your chambers. I had the opportunity to teach Sarah legal research and writing during her 1L year. Sarah was a great writer and an excellent student. In class, she was always prepared and willing to engage. And her writing skills were obvious from the beginning. She showed a mastery of the technical skills of writing that few, if any, of her classmates could match. In retrospect, this was perhaps unsurprising given her work in copy editing during her undergraduate studies. But what her technical facility allowed her to do was to focus on the substantive intricacies of crafting a legal argument. Here too Sarah shined. Her arguments were clear and belied a close, nuanced reading of the law that is rare in 1Ls. Indeed, on her very first assignment, I was able to give her more detailed substantive feedback than I gave to some students on their final assignment of the year. In summary of my feedback on that assignment, I simply told her that she had a “clearly written and well analyzed” memo, and that the way for her to improve was to continue looking for additional nuance in the cases she read. Of course, implicit in this feedback was my recognition that she had already found an impressive level of legal nuance for a first quarter 1L.

Sarah clearly took that advice to heart, as she received one of the top grades in the class every quarter. Of course, I can’t take too much credit for Sarah’s success. She has regularly placed herself at or near the top of the class in many of her classes, achieving A’s (180+ in Chicago’s grading scheme) in a broad range of substantive courses.

But beyond her (many) academic successes, Sarah is unassuming in the best way. She does not shout her achievements from the rooftops or carry herself with an air of superiority (even if it would be a well-deserved one). She strives, I have learned, to be like her parents and grandmother: incredibly hard working, marvelously kind, and striving to put her talents to use for the betterment of those less fortunate than she. She came into law school wanting to do immigration work, and that is still her primary interest. But she remains open to her final professional destination because she has been surprised by how much she’s enjoyed other potential areas of public interest work, like criminal law, during law school.

Sarah will make an excellent law clerk, and I recommend her without reservation.

Sincerely,

Adam Davidson

SARAH WANG
6206 S. Woodlawn Avenue, Apt. 1N, Chicago, IL 60637 • (732) 599-4133 • swang12@uchicago.edu

Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a brief for defendant-appellee Datavault on a fictional claim for negligence and breach of implied contract in the Seventh Circuit without having read the appellant's brief. To create an 11-page writing sample, I omitted the statement of jurisdiction, statement of issues, statement of the case, procedural history, and conclusion. I have discussed the writing sample with my school's writing coach.

The basic facts of the case are as follows. Defendant-appellee Datavault is a corporation that offers a digital vault to store online usernames and passwords as well as personal and financial details. Plaintiff-appellant Midway is a customer who stored information in Datavault's system. In September 2020, Datavault suffered a data breach in which hackers downloaded the digital vaults of all customers, the customers' internal Datavault IDs, which included their social security numbers, and the customers' encrypted passwords for the vaults. Nine other technology companies were also breached at the same time. After the breach, Midway experienced no symptoms of identity theft but took several actions to proactively protect himself. He then sued Datavault, claiming injuries in the form of increased risk of identity theft, cost of monitoring his accounts, and emotional distress. Datavault argued that Midway had not suffered an injury-in-fact, and the district court granted Datavault's motion to dismiss for lack of standing.

I chose the argument section of my brief as my writing sample. The omitted conclusion section asks the Seventh Circuit to affirm the district court's order dismissing the case.

SUMMARY OF THE ARGUMENT

The district court properly granted Datavault's motion to dismiss. Midway bears the burden of proving Article III standing, which requires injury-in-fact, causation, and redressability, and he cannot prove any of the three factors.

First, Midway's alleged injuries are based entirely on his risk of future identity theft, the resultant emotional distress, and his proactive spending to alleviate his fear. The Supreme Court recently held that mere risk of future harm is not an injury-in-fact in a suit for damages, conclusively barring Midway's first alleged injury. The Supreme Court's decision also overruled Seventh Circuit precedent finding injury-in-fact in data breach cases where plaintiffs showed substantial risk of identity theft, foreclosing a potential argument for Midway. But even if Seventh Circuit precedent stands, Midway fails to cross the line from merely possible future harm to "substantial risk," because over a year and a half after the breach, he has failed to allege that any Datavault users have suffered symptoms of identity theft.

Moreover, neither Midway's emotional distress nor the costs to monitor his financial accounts qualify as separate injuries-in-fact. This Court has long held that emotional distress resulting from a risk of future harm is an abstract harm beyond the court's power to remedy. Supreme Court precedent also prohibits plaintiffs from manufacturing standing by incurring costs in response to harm that is not imminent, and Midway's risk of identity theft is merely possible.

Finally, Midway's claim that Datavault's breach caused his injuries is implausible given the occurrence of multiple data breaches at other companies in the same time frame and the time that has passed since the Datavault breach without incidents of identity theft. This Court also cannot redress the ultimate source of Midway's alleged injuries, the independent actions of potentially malicious third parties.

ARGUMENT

I. Standard of Review

A district court's dismissal for lack of Article III standing is reviewed de novo. *Reid L. v. Ill. State Bd. of Educ.,* 358 F.3d 511 (7th Cir.2004).

II. Midway does not have standing because he cannot prove that he suffered an injury-in-fact.

Article III courts are limited to adjudicating actual "cases" and "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Standing "enforces this limitation by ensuring that courts only adjudicate disputes in which the plaintiff has a personal stake." *Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184, 1190 (7th Cir. 2021) (internal quotations omitted). Courts have a strong presumption against finding standing absent a clear showing to the contrary. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("[W]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.").

At the pleading stage, every plaintiff bears the burden of establishing the three elements that constitute the "irreducible constitutional minimum" of standing: 1) injury-in-fact, 2) fairly traceable to the defendant, and 3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To establish injury-in-fact, the plaintiff must allege "an invasion of a legally protected interest" that is concrete and particularized. *See id.* at 560. As the Supreme Court succinctly put it: "no concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). For the reasons that follow, Midway has not suffered a concrete harm.

A. Midway only alleges an increased risk of future identity theft, which does not qualify as a concrete harm.

The Supreme Court established in *TransUnion* that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm." *Id.* at 2211. In *TransUnion*, a class of 8,185 plaintiffs sued TransUnion for falsely labelling them as potential terrorists in their credit reports, but only 1,853 class members' credit reports were actually sent to third-party businesses. *Id.* at 2200. The remaining class members argued that they nonetheless suffered a concrete injury because the mere existence of misleading alerts in their credit reports exposed them to a material risk that the information would be disseminated in the future. *Id.* at 2210. They relied on language from *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) noting that a substantial risk of harm can sometimes satisfy the requirement of concreteness. *See TransUnion*, 141 S. Ct. at 2210. The *TransUnion* Court rejected this argument, explaining that a substantial risk of harm only suffices to confer standing for *injunctive* relief, whereas in a suit for damages, the individual has suffered no concrete harm until the risk for future harm *materializes*. *See id.*

1. Seventh Circuit liberal precedent regarding injury-in-fact was overruled by *TransUnion.*

Despite *TransUnion*'s holding, Midway may claim that this Court's precedent has established that substantial risk of identity theft qualifies as concrete harm. *See Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015). This reliance is misplaced. *Remijas* preceded and clearly contradicts *TransUnion*. "If existing circuit precedent cannot be reconciled with a subsequent ruling from the Supreme Court, then the latter governs." *Strautins v. Trustwave Holdings, Inc*., 27 F. Supp. 3d 871, 879 (N.D. Ill. 2014).

The facts of *Remijas* are remarkably similar to *TransUnion*. A class of 350,000 Neiman Marcus customers sought damages when their credit card data was exposed in a data breach, but

only 9,200 of the customers experienced fraudulent charges. *Remijas*, 794 F.3d at 689–90. The court nonetheless held that all class members had suffered an injury-in-fact, reasoning that "it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the. . . data breach" because they knew, based on the fraudulent charges other customers had experienced, that the hackers intended to misuse their personal information. *See id.* at 693. Other Seventh Circuit decisions relating to data breach cases since *Remijas* have followed this reasoning. *See, e.g.*, *Lewert v. P.F. Chang's China Bistro*, *Inc*., 819 F.3d 963 (7th Cir. 2016).

In relying on *Remijas'* reasoning, Midway attempts to argue exactly what the Supreme Court rejected in *TransUnion*. Midway has not suffered identity theft or fraudulent transactions, and he seeks compensation, not injunctive relief. R8. Yet he claims that he should be allowed to sue based on the pre-existing risk of identity theft alone, without this risk ever having materialized. This argument plainly flies in the face of *TransUnion's* holding. Indeed, the Seventh Circuit recently acknowledged that *TransUnion* heightened the requirements for standing: "Until recently there was a hint that the mere "risk of real harm" could concretely injure plaintiffs seeking money damages. . . However, as the Supreme Court clarified in *TransUnion*, a risk of harm qualifies as a concrete injury only for claims for. . . injunctive relief." *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022) (internal quotation marks omitted). *Pierre* implicitly acknowledges that *Remijas* has been overruled.

Thus, the district court properly held that Midway cannot establish injury-in-fact based merely on his increased risk of identity theft.

2. Arguing in the alternative, even if *Remijas* remains good law, Midway's increased risk of identity theft is too speculative to qualify as substantial risk.

Even under a more liberal standard, Midway has not met his burden of proving that he faces either "certainly impending" harm or a "substantial risk" of harm, as required under *Remijas* and *Clapper*. *See Remijas*, 794 F.3d at 692 (citing *Clapper*, 568 U.S. at 401). The Supreme Court established in *Clapper* that mere allegations of "*possible* future harm" are too speculative to constitute injury-in-fact, even when it is "objectively reasonable" to think that the injury might materialize. *Clapper*, 568 U.S. at 398, 410. Moreover, the Clapper Court declined "to endorse standing theories that rest on speculation about the decisions of independent actors" and on a "highly attenuated set of possibilities." *Id.* at 410, 414.

The risk of credit card fraud faced by the *Remijas* plaintiffs crossed the threshold from merely possible to substantial because thousands of class members had *already* experienced fraudulent charges; this made it plausible to infer that the remainder would fall victim to the same harms. *See Remijas,* 794 F.3d at 693. Most courts that have allowed plaintiffs to sue after a data breach without having suffered credit card fraud or identity theft have relied on the fact that at least *some* members of the class experienced symptoms of identity theft. *See, e.g.*, *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (individual attempted to open a bank account with one plaintiff's SSN after unencrypted laptop containing personal information was stolen); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1215 (N.D. Cal. 2014) (stolen personal data of customers surfaced on the internet following data breach); *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 827 (7th Cir. 2018) (customers experienced unauthorized charges following data breach). By contrast, where no class members have experienced symptoms of identity theft, courts have largely declined to find injury-in-fact. *See, e.g.*, *In re Zappos.com, Inc.,*108 F.Supp.3d

949 (D. Nev. 2015); *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017); *Khan v. Children's Nat'l Health Sys.*, 188 F.Supp.3d 524 (D. Md. 2016).

Midway's case falls squarely into the latter category. More than a year and a half after the breach, he has not alleged that even *one* of the 10,000 Datavault users has experienced fraudulent transactions or credit card fraud. "The more time that passes without the alleged future harm actually occurring undermines any argument that the threat of that harm is immediate, impending, or otherwise substantial." *Zappos.com*, 108 F.Supp.3d at 958; see also *Kylie S. v. Pearson PLC*, 475 F.Supp.3d 841, 847 (N.D. Ill. 2020). If the threat of identity theft were imminent, one would have expected at least some Datavault users to have experienced symptoms of identity theft in all this time. Indeed, the *Zappos.com* Court observed: "[T]he passage of time without a single report from Plaintiffs that they in fact suffered the harm they fear must mean something." *Zappos.com*, 108 F.Supp.3d at 958*; see also Whalen v. Michael Stores, Inc.*, 153 F.Supp.3d 577, 583 (E.D.N.Y. 2015). Here, the lapsed time with no fraudulent charges might mean that the hackers were unable to decrypt the digital vaults, that they decided to do nothing with the data, or that they are extraordinarily patient. But determining what this means "requires the Court to engage in speculation—precisely what the Supreme Court has counseled against." *Zappos.com*, 108 F.Supp.3d at 958.

Moreover, Midway's allegations of future harm rely on a highly attenuated set of possibilities: 1) the hackers must understand that the usernames contain SSNs and/or decrypt the digital vaults; 2) they must select Midway's information out of all 10,000 accounts; 3) they must intend to misuse the information; 4) they must succeed in doing so. *See Clapper*, 568 U.S. at 414. Courts have rejected claims of injury-in-fact grounded in such speculative chains of events. *See Beck*, 848 F.3d at 269; *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*,

45 F.Supp.3d 14, 25 (D.D.C. 2014); *Reilly v. Ceridian Corp.,* 664 F.3d 38, 42 (3d Cir. 2011). Given the contingent nature of Midway's alleged injury and the lack of existent fraudulent charges to support an inference of future misuse, Midway's increased risk of identity theft cannot be substantial enough to qualify as injury-in-fact.

B. Midway's exposure to future risk did not cause a separate concrete harm.

Notwithstanding that Midway's increased risk of identity theft is too speculative to be an injury-in-fact, he may argue, per *TransUnion*, that the exposure to the risk of future harm itself caused him a separate concrete harm. *See TransUnion*, 141 S. Ct. at 2211. The *TransUnion* Court held that in determining whether these harms qualify as concrete, courts should assess whether they have a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204. Both tangible harms, such as physical and monetary harms, and intangible harms with a close common law analog may potentially qualify as concrete. *Id.* Midway's claims of negligence and implied breach of contract are traditional common law causes of action, but the inquiry does not stop there. Just as the Court in *TransUnion* reasoned that the plaintiffs needed to first show evidence of publication to pursue a defamation claim, *id.* at 2209, any action for negligence or implied breach of contract requires a showing of actual damages. *See Borsellino v. Goldman Sachs Grp., Inc*., 477 F.3d 502, 510 (7th Cir. 2007); *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir. 2010). As previously established, increased risk of identity theft alone cannot count as the damages for either claim. Thus, Midway will likely argue

that his emotional distress is a physical harm, and the cost to monitor and alter his financial accounts is a monetary harm. For the reasons that follow, both claims are unavailing.

1. Midway's emotional distress does not qualify as a physical harm.

Midway may cite to *TransUnion*'s dicta, which left open the possibility that emotional injury suffices as an injury-in-fact, to claim that his emotional distress is akin to a compensable physical harm. *See TransUnion*, 141 S. Ct. at 2211. However, Seventh Circuit precedent has long held that emotional distress cannot establish injury-in-fact when the distress follows from a mere risk of harm. In *Wadsworth v. Kross*, *Lieberman & Stone, Inc.*, 12 F.4th 665 (7th Cir. 2021), where the plaintiff suffered anxiety and lost sleep after a debt collector contacted her about a time-barred debt, this Court held that "anxiety and embarrassment are not injuries in fact. . . These are quintessential abstract harms that are beyond our power to remedy." *See id.* at 666, 668; *see also Pierre*, 29 F.4th at 939. Other courts have likewise declined to find that emotional distress confers standing in the data breach context. *See, e.g.*, *Reilly*., 664 F.3d at 44 (rejecting plaintiff's claim that emotional distress from data breach was akin to medical-device and toxic-tort cases). Midway's allegations of anxiety, difficulty sleeping, and trouble focusing are no more than "abstract harms" that fall short of cognizable injury-in-fact. R8. Furthermore, though Midway may argue that his therapy sessions show a medical diagnosis of physical harm, this claim is undermined by the fact he was *already* regularly attending therapy for anxiety and would have seen his therapist even without the breach. *Id.* Midway cannot use a pre-existing condition to claim Datavault caused him injury.

2. The costs Midway incurred to monitor and alter his financial accounts do not qualify as monetary harm.

Midway's decision to incur costs in response to the risk of identity theft is directly analogous to *Clapper*, in which the plaintiffs claimed that that their efforts to conceal their

communications for fear of surveillance under the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1881a, sufficed for injury-in-fact. *Clapper*, 568 U.S. at 401, 415. The *Clapper* Court held that these proactive measures based on "fears of . . . future harm that is not certainly impending" do not create an injury-in-fact. *Id.* at 416.

Midway's expenses were similarly based on his fear of *possible* identity theft after the breach. Though Midway may point to the *Remijas* Court's ruling that the financial monitoring expenses incurred by Neiman Marcus customers after the breach were injuries-in-fact, his case is distinguishable. *Remijas*, 794 F.3d at 694. As explained above, unlike the *Remijas* plaintiffs, Midway does not face a substantial risk of harm. His monitoring expenses are thus "not the result of any present injury, but rather the anticipation of future injury that has not materialized." *SAIC*, 45 F.Supp.3d. at 26. The costs to Midway's business are even further removed from any actual harm: they resulted from his decision to prophylactically freeze his credit to "ease fears of third-party criminality." *Reilly*, 664 F.3d at 46. Midway "cannot manufacture standing merely by choosing to make expenditures based on hypothetical future harm." *Clapper*, 568 U.S. at 401.

III. Even if Midway proves injury-in-fact, he cannot prove that his injuries were fairly traceable to Datavault's breach.

Given that nine other technology companies experienced known data breaches concurrently with Datavault, Midway bears the burden of showing that his injuries were caused by Datavault. R6. Though the Seventh Circuit rejected a similar argument from Neiman Marcus in *Remijas*, as noted previously, in that case the customers experienced fraudulent charges shortly after the breach. *Remijas*, 794 F.3d at 693. Midway faces an uphill climb in proving causation when more than a year and a half has passed without incident for Datavault users, while identity theft has occurred for customers of *other* companies. Indeed, at this point it may be more plausible to infer

that future incidents of identity theft originate from the breaches at those companies. Moreover, the fact that Shaffer Software is used in millions of websites and apps, combined with Midway's extensive digital presence, suggests that his information may well have been exposed in unknown breaches of other sites. *See Zappos.com*, 108 F.Supp.3d at 960 ("Since today so much of our personal information is stored on servers just like the ones that were hacked in this case, it is not unrealistic to wonder whether Plaintiffs' hypothetical future harm could be traced to Zappos's breach.")

Given the length of time that has passed since the Datavault breach without incident and the abundance of other sources that may have exposed Midway's information, Midway's claim that Datavault caused his injuries is implausible.

IV. Redressability is not satisfied because a court ruling would not prevent third parties from misusing Midway's information.

Finally, it is unlikely that a favorable decision from the Court would redress the harm that Midway has allegedly experienced from his increased risk of identity theft. Midway has not suffered any *quantifiable* damage that the court can redress. His lawsuit stems primarily from his fear of potential criminality from independent third parties. Redressability in this scenario hinges on the response of these parties to the Court's decision. A ruling from this Court awarding Midway speculative monetary damages would not "disgorge [third parties] of [Midway's] personal information," nor would it prevent them from using this information to steal his identity. *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847, 857 (S.D. Tex. 2015) (internal quotation marks omitted). The Court cannot control the decisions of these third parties, who are not before the Court and are independent of Datavault, and the Court's ruling cannot alleviate Midway's fear of

future harm. Thus, Midway has failed to make the requisite demonstration of redressability for his alleged injuries.

SARAH WANG
6206 S. Woodlawn Avenue, Apt. 1N, Chicago, IL 60637 • (732) 599-4133 • swang12@uchicago.edu

Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a brief for defendant-appellee Datavault on a fictional claim for negligence and breach of implied contract in the Seventh Circuit without having read the appellant's brief. To create an 11-page writing sample, I omitted the statement of jurisdiction, statement of issues, statement of the case, procedural history, and conclusion. I have discussed the writing sample with my school's writing coach.

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SUMMARY OF THE ARGUMENT

The district court properly granted Datavault's motion to dismiss. Midway bears the burden of proving Article III standing, which requires injury-in-fact, causation, and redressability, and he cannot prove any of the three factors.

First, Midway's alleged injuries are based entirely on his risk of future identity theft, the resultant emotional distress, and his proactive spending to alleviate his fear. The Supreme Court recently held that mere risk of future harm is not an injury-in-fact in a suit for damages, conclusively barring Midway's first alleged injury. The Supreme Court's decision also overruled Seventh Circuit precedent finding injury-in-fact in data breach cases where plaintiffs showed substantial risk of identity theft, foreclosing a potential argument for Midway. But even if Seventh Circuit precedent stands, Midway fails to cross the line from merely possible future harm to "substantial risk," because over a year and a half after the breach, he has failed to allege that any Datavault users have suffered symptoms of identity theft.

Moreover, neither Midway's emotional distress nor the costs to monitor his financial accounts qualify as separate injuries-in-fact. This Court has long held that emotional distress resulting from a risk of future harm is an abstract harm beyond the court's power to remedy. Supreme Court precedent also prohibits plaintiffs from manufacturing standing by incurring costs in response to harm that is not imminent, and Midway's risk of identity theft is merely possible.

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ARGUMENT

I. Standard of Review

A district court's dismissal for lack of Article III standing is reviewed de novo. *Reid L. v. Ill. State Bd. of Educ.,* 358 F.3d 511 (7th Cir.2004).

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At the pleading stage, every plaintiff bears the burden of establishing the three elements that constitute the "irreducible constitutional minimum" of standing: 1) injury-in-fact, 2) fairly traceable to the defendant, and 3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To establish injury-in-fact, the plaintiff must allege "an invasion of a legally protected interest" that is concrete and particularized. *See id.* at 560. As the Supreme Court succinctly put it: "no concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). For the reasons that follow, Midway has not suffered a concrete harm.

A. Midway only alleges an increased risk of future identity theft, which does not qualify as a concrete harm.

The Supreme Court established in *TransUnion* that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm." *Id.* at 2211. In *TransUnion*, a class of 8,185 plaintiffs sued TransUnion for falsely labelling them as potential terrorists in their credit reports, but only 1,853 class members' credit reports were actually sent to third-party businesses. *Id.* at 2200. The remaining class members argued that they nonetheless suffered a concrete injury because the mere existence of misleading alerts in their credit reports exposed them to a material risk that the information would be disseminated in the future. *Id.* at 2210. They relied on language from *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) noting that a substantial risk of harm can sometimes satisfy the requirement of concreteness. *See TransUnion*, 141 S. Ct. at 2210. The *TransUnion* Court rejected this argument, explaining that a substantial risk of harm only suffices to confer standing for *injunctive* relief, whereas in a suit for damages, the individual has suffered no concrete harm until the risk for future harm *materializes*. *See id.*

1. Seventh Circuit liberal precedent regarding injury-in-fact was overruled by *TransUnion.*

Despite *TransUnion*'s holding, Midway may claim that this Court's precedent has established that substantial risk of identity theft qualifies as concrete harm. *See Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015). This reliance is misplaced. *Remijas* preceded and clearly contradicts *TransUnion*. "If existing circuit precedent cannot be reconciled with a subsequent ruling from the Supreme Court, then the latter governs." *Strautins v. Trustwave Holdings, Inc*., 27 F. Supp. 3d 871, 879 (N.D. Ill. 2014).

The facts of *Remijas* are remarkably similar to *TransUnion*. A class of 350,000 Neiman Marcus customers sought damages when their credit card data was exposed in a data breach, but

only 9,200 of the customers experienced fraudulent charges. *Remijas*, 794 F.3d at 689–90. The court nonetheless held that all class members had suffered an injury-in-fact, reasoning that "it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the. . . data breach" because they knew, based on the fraudulent charges other customers had experienced, that the hackers intended to misuse their personal information. *See id.* at 693. Other Seventh Circuit decisions relating to data breach cases since *Remijas* have followed this reasoning. *See, e.g.*, *Lewert v. P.F. Chang's China Bistro*, *Inc*., 819 F.3d 963 (7th Cir. 2016).

In relying on *Remijas'* reasoning, Midway attempts to argue exactly what the Supreme Court rejected in *TransUnion*. Midway has not suffered identity theft or fraudulent transactions, and he seeks compensation, not injunctive relief. R8. Yet he claims that he should be allowed to sue based on the pre-existing risk of identity theft alone, without this risk ever having materialized. This argument plainly flies in the face of *TransUnion's* holding. Indeed, the Seventh Circuit recently acknowledged that *TransUnion* heightened the requirements for standing: "Until recently there was a hint that the mere "risk of real harm" could concretely injure plaintiffs seeking money damages. . . However, as the Supreme Court clarified in *TransUnion*, a risk of harm qualifies as a concrete injury only for claims for. . . injunctive relief." *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022) (internal quotation marks omitted). *Pierre* implicitly acknowledges that *Remijas* has been overruled.

Thus, the district court properly held that Midway cannot establish injury-in-fact based merely on his increased risk of identity theft.

2. Arguing in the alternative, even if *Remijas* remains good law, Midway's increased risk of identity theft is too speculative to qualify as substantial risk.

Even under a more liberal standard, Midway has not met his burden of proving that he faces either "certainly impending" harm or a "substantial risk" of harm, as required under *Remijas* and *Clapper*. *See Remijas*, 794 F.3d at 692 (citing *Clapper*, 568 U.S. at 401). The Supreme Court established in *Clapper* that mere allegations of "*possible* future harm" are too speculative to constitute injury-in-fact, even when it is "objectively reasonable" to think that the injury might materialize. *Clapper*, 568 U.S. at 398, 410. Moreover, the Clapper Court declined "to endorse standing theories that rest on speculation about the decisions of independent actors" and on a "highly attenuated set of possibilities." *Id.* at 410, 414.

The risk of credit card fraud faced by the *Remijas* plaintiffs crossed the threshold from merely possible to substantial because thousands of class members had *already* experienced fraudulent charges; this made it plausible to infer that the remainder would fall victim to the same harms. *See Remijas,* 794 F.3d at 693. Most courts that have allowed plaintiffs to sue after a data breach without having suffered credit card fraud or identity theft have relied on the fact that at least *some* members of the class experienced symptoms of identity theft. *See, e.g.*, *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (individual attempted to open a bank account with one plaintiff's SSN after unencrypted laptop containing personal information was stolen); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1215 (N.D. Cal. 2014) (stolen personal data of customers surfaced on the internet following data breach); *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 827 (7th Cir. 2018) (customers experienced unauthorized charges following data breach). By contrast, where no class members have experienced symptoms of identity theft, courts have largely declined to find injury-in-fact. *See, e.g.*, *In re Zappos.com, Inc.,*108 F.Supp.3d

949 (D. Nev. 2015); *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017); *Khan v. Children's Nat'l Health Sys.*, 188 F.Supp.3d 524 (D. Md. 2016).

Midway's case falls squarely into the latter category. More than a year and a half after the breach, he has not alleged that even *one* of the 10,000 Datavault users has experienced fraudulent transactions or credit card fraud. "The more time that passes without the alleged future harm actually occurring undermines any argument that the threat of that harm is immediate, impending, or otherwise substantial." *Zappos.com*, 108 F.Supp.3d at 958; see also *Kylie S. v. Pearson PLC*, 475 F.Supp.3d 841, 847 (N.D. Ill. 2020). If the threat of identity theft were imminent, one would have expected at least some Datavault users to have experienced symptoms of identity theft in all this time. Indeed, the *Zappos.com* Court observed: "[T]he passage of time without a single report from Plaintiffs that they in fact suffered the harm they fear must mean something." *Zappos.com*, 108 F.Supp.3d at 958*; see also Whalen v. Michael Stores, Inc.*, 153 F.Supp.3d 577, 583 (E.D.N.Y. 2015). Here, the lapsed time with no fraudulent charges might mean that the hackers were unable to decrypt the digital vaults, that they decided to do nothing with the data, or that they are extraordinarily patient. But determining what this means "requires the Court to engage in speculation—precisely what the Supreme Court has counseled against." *Zappos.com*, 108 F.Supp.3d at 958.

Moreover, Midway's allegations of future harm rely on a highly attenuated set of possibilities: 1) the hackers must understand that the usernames contain SSNs and/or decrypt the digital vaults; 2) they must select Midway's information out of all 10,000 accounts; 3) they must intend to misuse the information; 4) they must succeed in doing so. *See Clapper*, 568 U.S. at 414. Courts have rejected claims of injury-in-fact grounded in such speculative chains of events. *See Beck*, 848 F.3d at 269; *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*,

45 F.Supp.3d 14, 25 (D.D.C. 2014); *Reilly v. Ceridian Corp.,* 664 F.3d 38, 42 (3d Cir. 2011). Given the contingent nature of Midway's alleged injury and the lack of existent fraudulent charges to support an inference of future misuse, Midway's increased risk of identity theft cannot be substantial enough to qualify as injury-in-fact.

B. Midway's exposure to future risk did not cause a separate concrete harm.

Notwithstanding that Midway's increased risk of identity theft is too speculative to be an injury-in-fact, he may argue, per *TransUnion*, that the exposure to the risk of future harm itself caused him a separate concrete harm. *See TransUnion*, 141 S. Ct. at 2211. The *TransUnion* Court held that in determining whether these harms qualify as concrete, courts should assess whether they have a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204. Both tangible harms, such as physical and monetary harms, and intangible harms with a close common law analog may potentially qualify as concrete. *Id.* Midway's claims of negligence and implied breach of contract are traditional common law causes of action, but the inquiry does not stop there. Just as the Court in *TransUnion* reasoned that the plaintiffs needed to first show evidence of publication to pursue a defamation claim, *id.* at 2209, any action for negligence or implied breach of contract requires a showing of actual damages. *See Borsellino v. Goldman Sachs Grp., Inc*., 477 F.3d 502, 510 (7th Cir. 2007); *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir. 2010). As previously established, increased risk of identity theft alone cannot count as the damages for either claim. Thus, Midway will likely argue

that his emotional distress is a physical harm, and the cost to monitor and alter his financial accounts is a monetary harm. For the reasons that follow, both claims are unavailing.

1. Midway's emotional distress does not qualify as a physical harm.

Midway may cite to *TransUnion*'s dicta, which left open the possibility that emotional injury suffices as an injury-in-fact, to claim that his emotional distress is akin to a compensable physical harm. *See TransUnion*, 141 S. Ct. at 2211. However, Seventh Circuit precedent has long held that emotional distress cannot establish injury-in-fact when the distress follows from a mere risk of harm. In *Wadsworth v. Kross*, *Lieberman & Stone, Inc.*, 12 F.4th 665 (7th Cir. 2021), where the plaintiff suffered anxiety and lost sleep after a debt collector contacted her about a time-barred debt, this Court held that "anxiety and embarrassment are not injuries in fact. . . These are quintessential abstract harms that are beyond our power to remedy." *See id.* at 666, 668; *see also Pierre*, 29 F.4th at 939. Other courts have likewise declined to find that emotional distress confers standing in the data breach context. *See, e.g.*, *Reilly*., 664 F.3d at 44 (rejecting plaintiff's claim that emotional distress from data breach was akin to medical-device and toxic-tort cases). Midway's allegations of anxiety, difficulty sleeping, and trouble focusing are no more than "abstract harms" that fall short of cognizable injury-in-fact. R8. Furthermore, though Midway may argue that his therapy sessions show a medical diagnosis of physical harm, this claim is undermined by the fact he was *already* regularly attending therapy for anxiety and would have seen his therapist even without the breach. *Id.* Midway cannot use a pre-existing condition to claim Datavault caused him injury.

2. The costs Midway incurred to monitor and alter his financial accounts do not qualify as monetary harm.

Midway's decision to incur costs in response to the risk of identity theft is directly analogous to *Clapper*, in which the plaintiffs claimed that that their efforts to conceal their

communications for fear of surveillance under the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1881a, sufficed for injury-in-fact. *Clapper*, 568 U.S. at 401, 415. The *Clapper* Court held that these proactive measures based on "fears of . . . future harm that is not certainly impending" do not create an injury-in-fact. *Id.* at 416.

Midway's expenses were similarly based on his fear of *possible* identity theft after the breach. Though Midway may point to the *Remijas* Court's ruling that the financial monitoring expenses incurred by Neiman Marcus customers after the breach were injuries-in-fact, his case is distinguishable. *Remijas*, 794 F.3d at 694. As explained above, unlike the *Remijas* plaintiffs, Midway does not face a substantial risk of harm. His monitoring expenses are thus "not the result of any present injury, but rather the anticipation of future injury that has not materialized." *SAIC*, 45 F.Supp.3d. at 26. The costs to Midway's business are even further removed from any actual harm: they resulted from his decision to prophylactically freeze his credit to "ease fears of third-party criminality." *Reilly*, 664 F.3d at 46. Midway "cannot manufacture standing merely by choosing to make expenditures based on hypothetical future harm." *Clapper*, 568 U.S. at 401.

III. Even if Midway proves injury-in-fact, he cannot prove that his injuries were fairly traceable to Datavault's breach.

Given that nine other technology companies experienced known data breaches concurrently with Datavault, Midway bears the burden of showing that his injuries were caused by Datavault. R6. Though the Seventh Circuit rejected a similar argument from Neiman Marcus in *Remijas*, as noted previously, in that case the customers experienced fraudulent charges shortly after the breach. *Remijas*, 794 F.3d at 693. Midway faces an uphill climb in proving causation when more than a year and a half has passed without incident for Datavault users, while identity theft has occurred for customers of *other* companies. Indeed, at this point it may be more plausible to infer

that future incidents of identity theft originate from the breaches at those companies. Moreover, the fact that Shaffer Software is used in millions of websites and apps, combined with Midway's extensive digital presence, suggests that his information may well have been exposed in unknown breaches of other sites. *See Zappos.com*, 108 F.Supp.3d at 960 ("Since today so much of our personal information is stored on servers just like the ones that were hacked in this case, it is not unrealistic to wonder whether Plaintiffs' hypothetical future harm could be traced to Zappos's breach.")

Given the length of time that has passed since the Datavault breach without incident and the abundance of other sources that may have exposed Midway's information, Midway's claim that Datavault caused his injuries is implausible.

IV. Redressability is not satisfied because a court ruling would not prevent third parties from misusing Midway's information.

Finally, it is unlikely that a favorable decision from the Court would redress the harm that Midway has allegedly experienced from his increased risk of identity theft. Midway has not suffered any *quantifiable* damage that the court can redress. His lawsuit stems primarily from his fear of potential criminality from independent third parties. Redressability in this scenario hinges on the response of these parties to the Court's decision. A ruling from this Court awarding Midway speculative monetary damages would not "disgorge [third parties] of [Midway's] personal information," nor would it prevent them from using this information to steal his identity. *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847, 857 (S.D. Tex. 2015) (internal quotation marks omitted). The Court cannot control the decisions of these third parties, who are not before the Court and are independent of Datavault, and the Court's ruling cannot alleviate Midway's fear of

future harm. Thus, Midway has failed to make the requisite demonstration of redressability for his alleged injuries.

Applicant Details

First Name	**Muiz**
Middle Initial	**K**
Last Name	**Wani**
Citizenship Status	**U. S. Citizen**
Email Address	**muizw@umich.edu**
Address	**Address** Street **5455 Dunwoody Mill Court** City **Atlanta** State/Territory **Georgia** Zip **30360** Country **United States**
Contact Phone Number	**4047914245**

Applicant Education

BA/BS From	**Georgia Institute of Technology**
Date of BA/BS	**December 2020**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry M. Campbell Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Logue, Kyle
klogue@umich.edu
734-936-2207
Edmonds, Mira
edmondm@umich.edu
Pinto, Timothy
tpinto@umich.edu
734-763-6256

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Muiz Wani
615 South Main Street
Ann Arbor, Michigan 48104
(404) 791-4245
muizw@umich.edu

June 12, 2023

The Honorable Juan R. Sánchez, Chief Judge
U.S. District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street, Courtroom 14-B
Philadelphia, PA 19106

Dear Judge Sánchez:

I am a rising third-year student at the University of Michigan Law School. I am writing to apply for a clerkship in your chambers for the 2024–2025 term.

Before entering law school, I studied Industrial Engineering and Economics at Georgia Tech. I developed vital skills, such as problem-solving, data analysis, and storytelling, from my STEM education. During and after college, I worked in management consulting, where I sharpened my writing and presentation abilities and learned how to work diligently to deliver quality work products under quick client deadlines.

My experiences in law school have solidified my decision to pursue a career in litigation. This past school year, I worked as a student attorney in the Civil-Criminal Litigation Clinic, competed in the Henry M. Campbell Moot Court Competition and placed as a quarterfinalist, and received a Certificate of Merit Award in Criminal Procedure: Bail to Post-Conviction Review. I also serve on the *Michigan Law Review* as a Senior Editor.

Currently, I am working as a summer associate at Skadden, Arps, Slate, Meagher & Flom LLP, where I have had the opportunity to work on assignments in the tax controversy, white-collar crime and government enforcement, and complex litigation practice groups. Last summer, I interned in the civil division of the U.S. Attorney's Office for the Southern District of New York. As a future law clerk, I hope to build on these experiences and further my development as a litigator.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

- Professor Kyle Logue: klogue@umich.edu, (734) 936-2207
- Professor Mira Edmonds: edmondm@umich.edu, (734) 647-1964
- Professor Timothy Pinto: tpinto@umich.edu, (734) 763-6256

Thank you for your time and consideration!

Best,

Muiz Wani

MUIZ WANI

615 S Main St, Ann Arbor, MI 48104 • (404) 791-4245 • muizw@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Expected May 2024 | GPA: 3.804
Journal: *Michigan Law Review* (Senior Editor & Scholarship Committee, Vol. 122; Associate Editor, Vol. 121)
Honors: Henry M. Campbell Moot Court Competition (Quarterfinalist), Dean's Scholarship Recipient, Certificate of Merit Award in Criminal Procedure: Bail to Post Conviction Review (Winter 2023)
Activities: Law and Economics Club (President), Peer Tutor (Constitutional Law, Criminal Law), 1L Oral Advocacy Competition, Sports Law Society, South Asian Law Students Association

GEORGIA INSTITUTE OF TECHNOLOGY — Atlanta, GA
Bachelor of Science in Industrial Engineering and Economics, *Highest Honors* — December 2020
Awards: Federal Jackets Fellow, Zell Miller Scholar, School of Economics Scholar, NSLF Scholar, Faculty Honors

WORK EXPERIENCE

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP — New York, NY
Summer Associate — May 2023 – Present

MICHIGAN LAW CIVIL-CRIMINAL LITIGATION CLINIC (CCLC) — Ann Arbor, MI
Student Attorney — August – December 2022
- Negotiated COD in eviction case that extended tenant's move-out date by 4 months and waived 1 month's rent
- Secured approval of client's disability-based reasonable accommodation to recoup housing voucher payment
- Represented exonerated client in administrative proceedings to remove name from child protection services registry

U.S. ATTORNEY'S OFFICE, SOUTHERN DISTRICT OF NEW YORK (SDNY) — New York, NY
Legal Intern, Civil Division — May – August 2022
- Drafted MTDs and reply briefs for immigration matters involving habeas petitions and visa adjudication requests
- Developed case theory behind *qui tam* action under the False Claims Act and participated in settlement negotiations
- Provided advice on whether plaintiff's *Bivens* and FTCA claims were time-barred given the statute of limitations

CAPITAL ONE — McLean, VA
Associate, Corporate Strategy Group — February – July 2021
- Launched go-to-market strategies for products by assessing market size, competitors, and brand differentiation
- Employed a cross-functional approach to integrate needs across departments to ensure product deployment
- Automated data collection and analysis for weekly leadership reports on product performance and satisfaction

ACCENTURE — Atlanta, GA | New York, NY
Summer Strategy Analyst — June – August 2020 | June – August 2019
- Identified $12M increase in annual profit for a $40B energy company through an Excel optimization model
- Forecasted annual $750K savings in GHG costs and 21,000-ton reduction in CO_2 emissions through proposals
- Outlined $6.4M in savings for a $40B financial institution through a shared services business value case

LOGISTICS MANAGEMENT INSTITUTE (LMI) — McLean, VA
Summer Analyst, Health Advisory Services — May – August 2018
- Devised a methodology to predict federal health insurance market share by analyzing 5 years of historical data
- Transformed 200+ hours of manual entry into a 1-day task by scraping web data through a Python script
- Led a team of four to determine factors behind changes in 300+ doctor-insurance plan networks in the U.S.

U.S. HOUSE OF REPRESENTATIVES — Washington, DC
Legislative Intern, Committee on Science, Space, and Technology — August – December 2017
- Served in the Democratic office as a Federal Jackets Fellow to advance federal non-defense scientific legislation
- Drafted the Ranking Member's statement for the record for an Energy hearing on low-dose radiation research
- Prepared policy memos and drafted witness questions for members of Congress to utilize during hearings

ADDITIONAL

Interests: Democracy/Human Rights, NBA (LeBron), NFL (Falcons), Marvel/DC, Hip-hop (Drake), Memes

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Wani,Muiz Khalid
Student#: 36237796

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021			**(August 30, 2021 To December 17, 2021)**					
LAW	510	004	Civil Procedure	Maureen Carroll	4.00	4.00	4.00	A
LAW	520	003	Contracts	Albert Choi	4.00	4.00	4.00	A-
LAW	540	001	Introduction to Constitutional Law	Daniel Halberstam	4.00	4.00	4.00	A-
LAW	593	014	Legal Practice Skills I	Timothy Pinto	2.00		2.00	S
LAW	598	014	Legal Pract:Writing & Analysis	Timothy Pinto	1.00		1.00	S
Term Total				**GPA: 3.800**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.800**		**12.00**	**15.00**	
Winter 2022			**(January 12, 2022 To May 05, 2022)**					
LAW	530	002	Criminal Law	Luis CdeBaca	4.00	4.00	4.00	B+
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	A-
LAW	594	014	Legal Practice Skills II	Timothy Pinto	2.00		2.00	S
LAW	797	002	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A-
LAW	861	001	Law and Economics Workshop	Veronica Santarosa	1.00	1.00	1.00	A
Term Total				**GPA: 3.591**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.695**		**24.00**	**29.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Wani,Muiz Khalid
Student#: 36237796

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	664	001	European Union Law	Daniel Halberstam	3.00	3.00	3.00	A-
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	B+
LAW	920	001	Civil-Criminal Litigation Clnc	Mira Edmonds Victoria Clark	4.00	4.00	4.00	A+
LAW	921	001	Civil-Criminal Litig Clnc Sem	Mira Edmonds Victoria Clark	3.00	3.00	3.00	A
Term Total				**GPA: 3.861**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.754**		**37.00**	**42.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	A-
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A+
LAW	747	001	Taxation of Individual Income	Kyle Logue	4.00	4.00	4.00	A
LAW	834	001	Problems in Const'l Theory	Richard Primus	2.00		2.00	P
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
LAW	900	138	Research	Richard Primus	1.00		1.00	P
Term Total				**GPA: 3.972**	**15.00**	**11.00**	**15.00**	
Cumulative Total				**GPA: 3.804**		**48.00**	**57.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Wani,Muiz Khalid
Student#: 36237796

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/26/2023							
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	702	001	Insurance Law and Policy	Kyle Logue	3.00			
LAW	753	001	Trial Advocacy/Civil	Timothy Connors	3.00			
LAW	771	001	Progres Prosecution: Law&Pol'y	Eli Savit	2.00			
LAW	861	001	Law and Economics Workshop	Victoria Burton-Harris JJ Prescott Edward Fox	2.00			

End of Transcript
Total Number of Pages 3

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

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UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to strongly recommend Muiz Wani for the position of judicial clerk in your chambers. I have had the privilege of knowing Muiz as a student at the University of Michigan Law School, where he has demonstrated exceptional legal acumen, dedication, and leadership in various capacities. Because Muiz has excelled in two of my classes, and because he has done so well in law school generally, I am confident he will be an extraordinary lawyer. I also believe he will be an especially good law clerk. He is quite capable of doing the legal research and writing that you will expect of him, and at the very highest level. And he would be a pleasure to have around your office.

Let me elaborate further on his talent as a law student. I first met him when he was a 1L student in my Torts class in the winter of 2022. Although he was not among the students who frequently volunteered to answer questions (not a “gunner,” in other words), he was exceptionally good when called on. He was always well prepared and his answers reflected a keen understanding of the doctrinal issues in the cases. Also, he showed an uncommon ability—even for a Michigan Law student—to articulate subtle and persuasive legal arguments extemporaneously. This ability was also evident in his answers on the Torts final exam, where he was among the very best students in the class at marshalling the case law to support a particular position.

Muiz’s talent as a legal analyst has been even more apparent this past semester, during which he has been a student in my introductory income tax course. Tax is, of course, a very different sort of class than Torts: It is statutory and regulatory, where Torts is mainly about the common law. Moreover, Tax introduces a whole range of concepts that are never mentioned in the first year of law school and which many law students find especially difficult. For Muiz, however, Tax has been a breeze. From the beginning, he displayed a command of the material that put him at the very top of the class and that led me to rely on him to answer many of the most difficult questions. His performance in tax has been so good that I have urged him to take other tax classes and even to consider becoming a tax lawyer. (In case you’re wondering, that is the highest praise that a tax professor can give.)

Beyond my own experience with Muiz, his outstanding academic achievements speak for themselves. As a Juris Doctor candidate, expected to graduate in May 2024, Muiz has consistently excelled in his studies, as evidenced by his impressive grade point average. He has also contributed to the Michigan Law Review, serving as a Senior Editor and a member of the Scholarship Committee. Muiz's achievements extend beyond the classroom, as demonstrated by his participation in the Henry M. Campbell Moot Court Competition (where he reached the quarterfinals) and his receipt of the prestigious Dean's Scholarship.

In addition to his academic accomplishments, Muiz has shown great initiative in extracurricular activities. As the President of the Law and Economics Club, he has effectively led his peers and encouraged thoughtful dialogue on complex issues. Furthermore, Muiz has demonstrated his commitment to supporting fellow students by serving as a peer tutor in Constitutional Law and Criminal Law.

Muiz's work experience is equally impressive. As a Student Attorney at the Michigan Law Civil-Criminal Litigation Clinic, he successfully secured a change of occupancy date in an eviction case and represented a client in state administrative proceedings. During his time as a Legal Intern at the U.S. Attorney's Office for the Southern District of New York, Muiz drafted motions to dismiss and reply briefs for immigration matters, developed case theory for a qui tam action under the False Claims Act, and provided advice on Bivens and FTCA claims. Beyond his legal work, Muiz has a proven record of professional success. His experience in corporate strategy at Capital One, strategy analysis at Accenture, and health advisory services at LMI showcases his ability to adapt and excel in diverse environments. Moreover, his internship with the U.S. House of Representatives Committee on Science, Space, and Technology demonstrates his dedication to public service.

Muiz's impressive analytical abilities (which I have observed firsthand) along with his energy, drive, and discipline (demonstrated throughout his career) will make him an invaluable asset to your chambers. I wholeheartedly recommend Muiz Wani for the position of judicial clerk and have no doubt that he will exceed your expectations. Please do not hesitate to contact me if you require any further information or clarification.

Sincerely yours,

Kyle Logue
Douglas A. Kahn Collegiate Professor of Law

Kyle Logue - klogue@umich.edu - 734-936-2207

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to offer my enthusiastic recommendation of Muiz Wani as a judicial law clerk. Muiz is among the top 5% of students I have taught in my career. He is unusually sharp and remarkably hardworking, even in comparison to his smart and high-achieving peers at Michigan Law. I have no doubt that he would be an outstanding asset to your chambers.

Muiz was my student during the Fall 2022 semester in the Civil-Criminal Litigation Clinic ("CCLC") at Michigan Law. The CCLC is a general litigation clinic in which law students work in teams of two on a variety of civil and criminal legal matters. I was the primary supervisor of Muiz's casework and I also taught him in the seminar component of the clinic. During the semester he was enrolled, Muiz stood out as the strongest student in the course across all areas, including trial skill simulations, written seminar work, and every aspect of casework, including client counseling, negotiation, legal research and writing, and oral advocacy.

Under my supervision, Muiz and his partner worked on an eviction matter, an affirmative housing case, and a Child Protective Services central registry appeal. Muiz earned an incredibly rare A+ on his case work (his partner being the only other first-semester clinic student to whom I have awarded such a grade). Muiz put in hundreds of hours – far more than the credit load required – working tirelessly on behalf of his clients. Beyond his sheer doggedness, what made Muiz stand out was his innate ability to walk the line between taking full ownership of his cases while also consulting with me as his supervisor at appropriate junctures to ensure that he was on the right path. Very quickly I saw that I could trust Muiz's judgment completely, after which my supervision consisted primarily of giving him the thumbs up and just the slightest redirections.

Muiz demonstrated impressive acumen in his legal research and writing, as well as remarkable client counseling skills and negotiation ability. He and his partner wrote – under significant time pressure – an excellent request for reasonable accommodation which they sent on behalf of their housing client to the landlord and the agency administering her Section 8 voucher. At the same time, Muiz and his partner drafted and filed a robust answer to the eviction complaint, which created a backdrop against which they were able to negotiate. They managed to get all of this done despite their client's initial distrust and unreliable communication, due to her significant mental health struggles. Eventually, they earned their client's trust and were able to negotiate a favorable outcome that avoided an eviction judgment and termination of her Section 8 voucher. As a result, she was able to stay in her home until she could move into a new apartment with the continuing voucher subsidy. It is hard to overstate what an uphill battle Muiz and his partner faced and how successful they were in advocating for their client on multiple fronts simultaneously.

Muiz's work on the CPS registry case highlights yet more of his impressive qualities. The case was scheduled for hearing after the semester ended, and yet Muiz kept pushing forward with hearing preparation despite any imminent deadline looming. By the end of the semester, Muiz and his partner had prepared some seven witnesses to testify at the hearing and had put together a complete trial binder, which was instrumental in our ability to conduct the hearing shortly after the next semester began. That degree of organization, time management, and self-motivation is unusual in a 2L, and reflects Muiz's professional experience prior to law school. I would also note that Muiz developed a wonderful working relationship with his clinic partner. Despite having quite different dispositions and working styles, they quickly figured out how to collaborate in ways that drew on both of their strengths.

The capstone experience of the clinic seminar is a full mock trial. Muiz performed outstandingly in that context as well, demonstrating his thorough preparation, intellectual ability, and quiet confidence. Muiz aspires to a career in a U.S. Attorneys' office, and I have no doubt that he would make an excellent trial attorney. He has all the skills and dedication to do the work well; equally important, he has the moral compass and commitment to justice to do the work to the highest ethical standards.

In short, I have no hesitations in recommending Muiz to you as a judicial law clerk. I look forward to seeing what impressive accomplishments Muiz will achieve in his career.

Sincerely,

Mira Edmonds
Clinical Assistant Professor

Mira Edmonds - edmondm@umich.edu

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
801 Monroe Street, 945 Legal Research
Ann Arbor, Michigan 48109-1210

Tim Pinto
Clinical Professor of Law

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

The purpose of this letter is to offer a recommendation for Muiz Wani, who I understand is applying to be a clerk in your chambers. I believe Muiz will be an excellent clerk, and I strongly recommend him.

Muiz was a student in my Legal Practice class at the University of Michigan Law School during the 2021-2022 school year. Legal Practice is a full year course, required for first year students, covering legal writing, research, and various elements of legal practice such as ethics, negotiation, and oral argument. During the year, I not only saw Muiz in class, but also met with him individually a number of times, for required conferences about assignments and also as a drop-in during office hours. As a result, I got to know him, and his work, quite well.

Muiz was an excellent student. He was one of the strongest writers and researchers in the class. On every written assignment, he received one of the top grades. He writes crisply, analyzes well, and describes cases clearly. His research was always well organized and on point. While the class is graded as “pass/fail,” and thus I did not award Muiz a letter grade, I can tell you that he not only comfortably passed the class but was one of my top students.

I want to emphasize how impressed I was by Muiz’s writing for the class. From the very first assignment, I was struck by his ability to clearly summarize cases, analyze their meanings, and apply them to fact patterns. Not only was his analysis sharp, but he has a terrific ability to write efficiently – his writing voice is crisp, exact, and clear. In my mind, this is exactly the tone taken in strong judicial opinions and effective briefs, and thus I believe he is going to do excellent work as a clerk (and eventually as a practicing attorney).

Muiz is also very personable and easy to work with. As mentioned above, I require a number of conferences with my students, and Muiz always arrived with clear questions and a willingness to listen to and process feedback (and criticism). He did not take any of it personally, but simply looked to use my feedback to improve his written product. Similarly, from what I could see his classmates found him to be a helpful and productive person with whom to work. I occasionally break up the students into small groups and ask them to prepare certain assignments together; I could see that other students liked working with Muiz and that he was a quiet leader, contributing to group work that was consistently very strong.

For all of these reasons, I am very confident that Muiz is going to be an excellent judicial clerk. He is smart, professional, and diligent. He is going to fit in well in any chambers, and do great work. I am happy to recommend him, and I hope you consider him application seriously. I would welcome the opportunity to speak with you directly if you would like any further information.

Sincerely,

/Timothy M. Pinto/

Timothy M. Pinto
Clinical Professor of Law

Timothy Pinto - tpinto@umich.edu - 734-763-6256

MUIZ WANI

615 S Main St, Ann Arbor, MI 48104 • (404) 791-4245 • muizw@umich.edu

This writing sample is the brief I submitted for the Quarterfinal Round of the 2022-23 Campbell Moot Court Competition. Here, I am arguing on behalf of the Consumer Financial Protection Bureau (CFPB), respondent in the case. This writing sample is my own work and has not been edited by others. It has been condensed to fit 15 pages.

QUESTIONS PRESENTED

1. Whether the agency adjudication and assessment of a civil penalty under the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536, implicate the Seventh Amendment right to a civil jury trial.
2. Whether a dual-layer removal scheme for administrative law judges and Merit Systems Protection Board members violates the separation of powers doctrine.

STATEMENT OF THE CASE

A. Introduction

After the 2008 financial crisis, Congress, through the Consumer Financial Protection Act (CFPA), established the Consumer Financial Protection Bureau ("CFPB" or "Bureau") to protect American consumers from unfair, deceptive, and abusive practices by financial institutions. In 2020, the Bureau determined that Petitioner H.B. Sutherland Bank N.A. ("Sutherland" or "the Bank"), one of the largest financial institutions in the United States, violated the CFPA by misleading customers about the nature of various fees that would be levied on their accounts. The Bureau assessed $4.1M in civil penalties against Sutherland for their deceptive acts and practices.

This Court has repeatedly affirmed Congress's ability to place certain statutory rights of action beyond the ambit of the Seventh Amendment. This case is no different—here, the Bureau's enforcement action did not violate Sutherland's right to a civil jury trial due to the public rights doctrine and the absence of a common law analog. Furthermore, the removal process for Administrative Law Judges (ALJs), who oversee the Bureau's administrative proceedings, is consistent with this Court's jurisprudence on the removal of inferior Officers of the United States. Accordingly, this Court should affirm the Twelfth Circuit's decision.

B. Statutory Background

In 2010, Congress created the CFPB through the Dodd–Frank Wall Street Reform and Consumer Protection Act. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376. The Bureau was designed as an independent regulatory agency tasked with enforcing pre-existing federal consumer protection statutes and a new prohibition on unfair, deceptive, or abusive acts and practices (UDAAPs) in the consumer-finance sector, as outlined in the CFPA. 12 U.S.C. § 5531. Congress empowered the CFPB to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, bring civil suits in federal court, and issue binding and enforceable

decisions in administrative proceedings. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020).

The Bureau is under the leadership of a single Director, only removable by the President at will. *Id.* at 2192. The CFPB conducts adjudication proceedings under the Administrative Procedure Act (APA), which provides that executive agencies may appoint as many ALJs as necessary to conduct administrative hearings. 5 U.S.C. § 3105. The Bureau employs one ALJ.

ALJs are only removable by a showing of "good cause," which is determined by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(b); 5 C.F.R. § 930.211 (2022). Members of the MSPB themselves may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. § 1202(d). Thus, the Bureau ALJ is not directly removable by the President and is instead shielded by a two-layer removal process: (1) the requirement of a good cause finding for the ALJ's removal by the MSPB and (2) MSPB members are only removable after a finding of inefficiency, neglect of duty, or malfeasance.

C. Procedural History

In 2019, the CFPB initiated administrative proceedings against Sutherland for violation of the CFPA. The Bureau alleged that Sutherland made several false statements and misrepresentations to its customers over the phone and in-person. Sutherland enrolled customers, without first obtaining their approval, in an Account Protection Program (APP) and subsequently charged overdraft fees. Sutherland also falsely advertised that accounts would have no mandatory fees, despite the Bank's contrary practice of enrolling all new customers in the APP service.

Sutherland's initial proceedings were overseen by the Bureau's ALJ. The ALJ issued a Recommended Decision, which included both legal and factual findings, that ruled in the Bureau's favor on each claim. The ALJ determined that the Bank's misrepresentations were material to a reasonable consumer's decision to open and maintain accounts with Sutherland. The ALJ

recommended the assessment of $4.15M in civil penalties against the Bank for violating the CFPA, as well as the enjoinment of its APP service.

Following the ALJ's decision, Sutherland appealed to the Bureau's Director. On appeal, it raised two constitutional claims. First, it alleged that the CFPB violated its Seventh Amendment rights by assessing civil penalties under the CFPA without a jury trial. Second, it alleged that the Bureau's adjudicative structure, which protects the ALJ from direct presidential removal, hinders the President's constitutional duty to take care that the laws be faithfully executed.

In 2020, the Director upheld each of the ALJ's factual and legal findings. Sutherland filed a final motion with the Director to stay the decision, which was denied in December 2020. Pursuant to 12 U.S.C. § 5563, Sutherland subsequently filed a petition in the Twelfth Circuit to set aside the Director's final order. A divided panel on the Court of Appeals found in favor of the Bureau on both claims. Sutherland then petitioned for a rehearing en banc. In 2022, the Court of Appeals denied Sutherland's petition for review. Sutherland then filed a petition for writ of certiorari to the Supreme Court of the United States, which was granted in October 2022.

DISCUSSION

I. CONGRESS PROPERLY EMPOWERED THE BUREUAU TO ASSESS CIVIL PENALTIES TO PROTECT AGAINST DECEPTIVE FINANCIAL PRACTICES

While the Seventh Amendment guarantees the right to trial by jury "[i]n Suits at Common Law," U.S. Const. amend. VII, Congress may, in certain situations, place legal causes of action "that are closely analogous to common law claims . . . beyond the ambit of the Seventh Amendment" for matters involving "public rights." *Granfinanciera v. Nordberg*, 492 U.S. 33, 52 (1989). Here, the action brought by the Bureau falls under this public rights exception. Even if the exception does not apply, Petitioner's claim still fails under the traditional Seventh Amendment test. The CFPA's statutory scheme created a right of action with no common law analog, and the civil penalty remedy available

to the Bureau is equitable in nature here. Accordingly, Sutherland is not entitled to a jury trial for violating the CFPA.

A. The Statutory Scheme of the CFPA Falls Under the Public-Rights Doctrine Because it Addresses a Manifest Public Problem in the Consumer-Finance Industry

Under this Court's jurisprudence, Congress can assign "the factfinding function and initial adjudication" to administrative agencies in cases where "public rights" are in dispute. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450 (1977). "Public rights" litigation occurs when "the Government sues in its sovereign capacity to enforce public rights created by statutes." *Id.* Congress cannot, however, just "pluck[] private rights . . . and relabel[] them as public rights" to shelter them from the jury's ambit. *H.B. Sutherland Bank, N.A. v. Consumer Fin. Prot. Bureau*, 505 F.4th 1, 22 (12th Cir. 2022) (Cartwright, J., concurring). Rather, Congress must create a new cause of action to deal with a "manifest public problem" for which "traditional rights and remedies are inadequate" to properly address the issue. *Granfinanciera*, 492 U.S. at 60 (citing *Atlas Roofing*, 430 U.S. at 461).

Furthermore, the rights in question can only be delegated to a non-Article III forum when they are "so closely integrated into a public regulatory scheme" that the matter becomes "appropriate for agency resolution." *Id.* at 64 (internal quotations omitted). To meet this threshold, courts consider "whether jury trials would . . . dismantle the statutory scheme or impede swift resolution of the claims created by statute." *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 453 (2022) (internal quotations and citations omitted). Additionally, the decision to apply the public-rights doctrine is bolstered in cases where "resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern v. Marshall*, 564 U.S. 462, 490 (2011).

In this case, Congress created a new cause of action under the CFPA to deal with a manifest public problem for which traditional rights and remedies were inadequate. In the House Report on the CFPA, the Committee on Energy and Commerce noted that while the Federal Trade Commission (FTC) had "broad authority to protect consumers from unfair, deceptive, and unlawful practices with

respect to credit and debt," this authority did not apply to practices undertaken by financial institutions. H.R. Rep. No. 111-367, at 91 (2009). Thus, in order to deal with the "lack of aggressive enforcement against abusive and predatory loan products that contributed to the [2008] financial crisis," Congress created the Bureau to consolidate consumer protection functions to prohibit UDAAPs in the consumer-finance sector. *Id.* at 90.

The situation here mirrors that found in *Atlas Roofing*. There, the Court deferred to Congress's finding that the traditional approaches of dealing with harmful work-place conditions, including tort claims in negligence and wrongful death, were inadequate to deal with a "drastic" national problem of unsafe working conditions. 430 U.S. at 461. To combat the problem, Congress, through the Occupational Safety and Health Act (OSHA), authorized the Department of Labor to issue abatement orders and civil monetary penalties on any employers maintaining unsafe working conditions. *Id.* at 445. An analogous regulatory scheme under the CFPA is present in this case. To address a drastic national problem where consumers, often not well-versed in financial literacy, are manipulated by large and sophisticated institutions to sign-up for lending programs that they do not fully understand, Congress authorized the Bureau to enjoin these programs and issue civil penalties on any financial institution engaging in UDAAPs.

It is important to note that traditional remedies in *Atlas Roofing* were inadequate because they did not address the underlying risk posed by unsafe working conditions upfront—rather, the claims in tort only arose *after* an injury or death occurred in the workplace. 430 U.S. at 461. Through OSHA, Congress created a new cause of action that contained a more proactive remedy. It prohibited employers from operating workplaces with "recognized hazards that are causing or *are likely to cause* death or serious physical harm" to employees. 29 U.S.C. § 654 (emphasis added). Similarly, here, the Bureau considers whether a financial institution's act or practice "misleads or *is likely to mislead* the

consumer" when determining whether the act or practice is deceptive.[1] Thus, because the harm present is not a particularized injury-in-fact to a customer, and is rather the existence of a widespread practice that has the *ability* to mislead consumers (and potentially contribute to a global financial crisis), Congress can assign the factfinding function and initial adjudication required to enforce the CFPA to the Bureau.

Additionally, the rights concerning UDAAPs in the consumer-finance sphere are so closely integrated into a public regulatory scheme under the CFPA that the matter becomes appropriate for adjudication by the CFPB. Here, the CFPA created a comprehensive regulatory scheme by consolidating "consumer protection functions from each of the banking agencies . . . and some consumer financial protection functions from the [FTC]" under the newly assembled CFPB. H.R. Rep. No. 111-367, at 90. The CFPA, viewed in tandem with the EFTA and FRCA, serves as a "comprehensive set of statutory rights that further[s] Congress's objective of protecting consumers from harm by financial entities." *Sutherland Bank*, 505 F.4th at 11. These set of laws function as the culmination of over a century's worth of legal understanding to create a modern statutory framework for consumer financial protection. *See* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 Antitrust L.J. 121, 138–39 (2015). The Bureau is not "merely stepping into the shoes of private litigants," *Sutherland Bank*, 505 F.4th at 11, to enforce these laws—rather, it is acting as the federal sovereign entrusted with protecting the consumer rights of the public body.

To require a jury trial for all enforcement actions brought under the CFPA would dismantle the statutory scheme of the CFPA. Under the CFPA, the Bureau has the discretion to choose whether

[1] Consumer Fin. Prot. Bureau, *CFPB Consumer Laws and Regulations: UDAAP* 5 (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

to bring enforcement actions in-house before an ALJ, or before a judge in an Article III court. 12 U.S.C. § 5565(a)(1). This provides the proper balance needed for the agency to enforce the regulatory scheme. For cases that require a calculation of economic damages, where juries are typically needed, the Bureau can bring the action in the federal district courts.

In contrast, for cases where the objective is an injunction of the harmful practice, the Bureau is better suited to adjudicate the case in-house. The decision to grant an injunction, a form of equitable relief, is typically made by courts, not juries. Additionally, the method for assessing civil penalties, as prescribed by the statute, are for either "the Bureau or the court" to administer, not a jury. 12 U.S.C. § 5565(c)(3). This Court has already ruled on the issue—the assessment of civil penalties does not involve a "fundamental element of a jury trial." *Tull v. United States*, 481 U.S. 412, 426 (1987). To require that a jury be necessary to evaluate *all* enforcement actions brought by the Bureau would "subvert the consumer protection statutory scheme" and intrude on the discretion that Congress believed was appropriate to properly deter UDAAPs. *Sutherland Bank*, 505 F.4th at 11.

Finally, the Bureau's ALJs, as adjudicators in an expert Government agency, are often better suited to handle CFPA claims than juries are. The qualification process to become an ALJ is rigorous and involves having at least seven years of experience in participating in administrative formal hearings and passing a knowledge, skills, and abilities (KSA) assessment.[2] Given the "practical limitations of juries" when it comes to deciding "specialized and complex" financial claims involving intricate public rights, the expertise of ALJs allows for a more methodical and careful analysis of whether consumer protection statutes have been violated. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970); *Sutherland Bank*, 505 F.4th at 12. As such, Petitioner is not entitled to a jury trial under the Seventh Amendment.

[2] *Qualification Standard For Administrative Law Judge Positions*, U.S. Off. Pers. Mgmt., https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/ (last visited Jan. 6, 2023).

B. There is No Close Common Law Analog to the Right of Action Created by the CFPA

Even if the Court were to find that the public-rights doctrine is not applicable here, Sutherland is still not entitled to a jury trial. The CFPA's statutory scheme created a right of action with no close common law analog, and the civil penalty remedy is equitable in nature.

1. Fraud is not an appropriate common law analog because both the scienter and injury-in-fact requirements are missing here

The Seventh Amendment's jury trial guarantee only extends to causes of action which are "at least analogous" to those that "existed under the English common law when the Amendment was adopted." *Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996) (citing *Tull*, 481 U.S. at 417). To determine whether a statutory action is analogous to a suit at common law, the court "compare[s] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Tull*, 481 U.S. at 417 (citations omitted); *see also Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

Here, there is no common law cause of action analogous to that created by the CFPA. While the dissent in the Court of Appeals opinion argues that the UDAAP claim is analogous to common-law fraud, *Sutherland Bank*, 505 F.4th at 31 (Bernhard, J., dissenting), this assertion is misguided. Two key elements of common-law fraud are missing here: (1) an intent to deceive by the financial institution and (2) an injury-in-fact suffered by the consumer.[3]

While the CFPA has definitions for unfair and abusive practices and acts, it notably does not define deceptive acts. *See* 12 U.S.C. §§ 5531(c)-(d) (defining unfair acts as those which cause or will

[3] Traditional common-law fraud involves five elements: (1) a false representation, (2) in reference to a material fact, (3) made with the knowledge of its falsity, (4) with the intent to deceive, and (5) on which action is taken in reliance upon the representation. *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 961 F. Supp. 305, 309 (D.D.C. 1997)). The actions taken in reliance upon the false representation under the fifth prong establish a requirement for an injury-in-fact, as they must be to the detriment of the actor. *See, e.g.*, *Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 490 (8th Cir. 2004); *Freeh v. Lake Eugenie Land & Development, Inc.*, 857 F.3d 246, 249 (5th Cir. 2017).

likely injure customers, and abusive acts as those that take unreasonable advantage of the consumers). Both the definitions for unfair and abusive practices and acts lack a scienter requirement, which is "arguably the most . . . important element" of common-law fraud. *Sutherland Bank*, 505 F.4th at 25 (Cartwright, J., concurring) (citing *Magee v. Manhattan Life Ins. Co.,* 92 U.S. 93, 98 (1875)). Given that the CFPA does not define deceptive acts, courts should turn to the legislative history of the Act, which "helps appellate courts reach interpretations that . . . make the law [] more coherent," to determine the "purpose of [the] statutory phrase." Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 847, 860 (1992).

As noted in the House Report, the CFPA was designed to consolidate functions previously held by the FTC and apply them in a consumer-finance context through the Bureau. H.R. Rep. No. 111-367, at 90. The FTC consistently has defined deceptive acts as material representations that are likely to mislead a reasonable customer.[4] This definition does not include a scienter or injury-in-fact requirement, as the practice only needs to be *likely* to mislead. *See supra* Section I.A. The Bureau's own interpretation of deceptive acts strongly mirrors that set forth by the FTC and notes that "intent to deceive is not necessary for deception to exist."[5]

But under the dissent's line of reasoning, Congress could *never* assign the adjudication of deceptive acts to a non-Article III forum, given the supposed close link to common-law fraud. *See* 505 F.4th at 31-32 (Bernhard, J., dissenting). This, however, contradicts what federal courts have routinely held—that federal agencies, including the FTC, "need not show intent to deceive," nor need prove "actual customer deception," to adjudicate and hold that a practice is deceptive. *FTC v. Cantkier*, 767 F. Supp. 2d 147, 152 (D.D.C. 2011); *see also FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006); *FTC*

[4] James C. Miller, Chairman, Fed. Trade Comm'n, *FTC Policy Statement on Deception* 1-2 (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[5] Consumer Fin. Prot. Bureau, *supra* note 1, at 7.

v. Cyberspace.com, LLC, 453 F.3d 1196, 1201 (9th Cir. 2006). Thus, the public right of action concerning UDAAPs is not closely analogous to common-law fraud.

2. The reasoning in *Atlas Roofing*, not *Tull*, sets out why the remedies sought here are equitable in nature

The civil penalty remedy under the CFPA is equitable, not legal, in nature. A remedy is equitable in nature if it was sought in early English "courts of equity or admiralty," rather than in "courts of law." *Tull*, 481 U.S. at 417. While the presence of a legal remedy may require a jury trial when attached with claims typically brought in equity, *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974), there is no Seventh Amendment guarantee in a case where "a claimant can be made whole by only specific relief available in equity." *Plechner v. Widener Coll., Inc.*, 569 F.2d 1250, 1258 (3d Cir. 1977) (citations omitted).

Civil penalties are not necessarily legal in nature. While the Court in *Tull* noted that such penalties were a remedy at common law "that could only be enforced in courts of law," 481 U.S. at 422, this was specifically in reference to civil penalty suits for actions in *debt*—common law claims "within the jurisdiction of the courts of law." *Id.* at 418. In contrast, the Court in *Atlas Roofing* held that Congress can create statutory obligations, enforceable in administrative tribunals, that provide "civil penalties for their violation" in proceedings "unknown to the common law." 430 U.S. at 450, 453 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937)). The parallel here with *Atlas Roofing* is clear—just as OSHA "aimed to fill the gaps left by the rigidity of" traditional workplace injury remedies, the CFPA similarly fills the gaps in common-law fraud. *Cf. Sutherland Bank*, 505 F.4th at 28 (Cartwright, J., concurring). Thus, because the CFPA created a proceeding unknown to the common law, *see supra* Section I.B.1, the Bureau can employ the civil penalty remedy without the need for a jury trial.

Finally, the Bureau, acting on behalf of the public, is only made whole through the assessment of civil penalties. The civil penalties do not represent economic damages owed to an individual for a

private harm, nor do they represent punitive damages. The statute expressly outlines "civil money penalties" as being separate from "payment of damages or other monetary relief," and clearly prohibits the construal of these penalties as punitive damages. 12 U.S.C. §§ 5565(a)(2)-(3). The penalties are aggregated in a Civil Penalty Fund. The Bureau can allocate penalty funds to a variety of initiatives aimed at boosting the public's knowledge of consumer finance, including "consumer education and financial literacy programs."[6] Thus, these penalties are "equitable remedies" designed as "statutory stopgap[s] to prevent injustice." *Sutherland Bank*, 505 F.4th at 28 (Cartwright, J., concurring) (citations omitted). Petitioner's request for a jury trial, accordingly, must be denied.

II. THE DUAL-LAYER REMOVAL SCHEME FOR ADMINISTRATIVE LAW JUDGES DOES NOT VIOLATE THE "TAKE CARE" CLAUSE

Sutherland's separation-of-powers claim should be denied. While Article II of the Constitution vests "[t]he executive power" in the President, it does not grant the President unlimited authority to remove "officers of the United States." U.S. Const. art. 2, §§ 1-2. Indeed, this Court's jurisprudence holds that "inferior officers with limited duties and no policymaking or administrative authority" can be shielded from direct presidential removal. *Seila Law*, 140 S. Ct. at 2200; *see also Morrison v. Olson*, 487 U.S. 654 (1988). Because ALJs are inferior officers that do not engage in policymaking, act effectively as federal district court judges, and are held appropriately accountable for their conduct, the dual-removal scheme here is constitutional.

A. Administrative Law Judges Do Not Engage in Policymaking

ALJs are not policymakers. Members of the executive branch that "exercise policymaking" often have the ability to initiate enforcement investigations "sua sponte." *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021). Additionally, agency actors with limited power do not wield

[6] *See* Consumer Fin. Prot. Bureau, *Civil Penalty Fund*, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/ (last visited Jan. 6, 2023).

policymaking authority if that power, even if "significant," is "trained inward to high-ranking Governmental actors." *Seila Law*, 140 S. Ct. at 2200.

Here, the Bureau's ALJ does not have the ability to bring enforcement actions on their own accord. That power lies with the Director and the Bureau's enforcement attorneys. *See, e.g.*, Notice of Charges at 20, PHH Corp., CFPB No. 2014-CFPB-0002 (Nov. 25, 2014) (demonstrating that enforcement actions are brought by the "Deputy Enforcement Director for Litigation"). ALJs conduct, and do not initiate, administrative hearings. 12 C.F.R. § 1081.104 (2022). From the CFPB's website, the agency has brought forth over 160 enforcement actions in-house, of which only two have resulted in the issuance of an enforcement decision authored by an ALJ.[7] In these cases, the ALJ was performing "purely adjudicatory function[s]"—not policymaking. *Decker Coal*, 8 F.4th at 1133.

Additionally, the power wielded by ALJs is trained inward to a high-ranking Governmental actor—the Director of the Bureau. Any final decision on an enforcement action is always made by the Director. *See* 12 C.F.R. § 1081.405(c) (2022) (noting how the Director can "affirm, adopt, reverse, modify, set aside, or remand" the findings of the ALJ). For example, in one administrative adjudication, the Director affirmed, "though on somewhat different grounds," the ALJ's decision to hold a mortgage company liable for violating consumer-financial protection laws. Decision of the Director at 2, PHH Corp., CFPB No. 2014-CFPB-0002 (June 4, 2015). Because the Bureau's ALJ possesses "purely recommendatory powers," they do not perform policymaking functions. *Free Enter. Fund*, 561 U.S. at 507 n.10.

[7] *See* Consumer Fin. Prot. Bureau, *Docket of the Office of Administrative Adjudication*, https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/ (last visited Jan. 6, 2023).

B. Administrative Law Judges Effectively Function as Federal District Court Judges

ALJs have "nearly all the tools of federal trial judges." *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2053 (2018). This Court has routinely held that Congress can grant authority to adjudicators, resembling Article III judges, to enter decisions on a "narrow category of cases" in a non-Article III forum. *See Freytag v. Commissioner*, 501 U. S. 868, 875 (1991). This has been applied in the context of tax courts, bankruptcy courts, and administrative courts. *See, e.g.*, *Freytag*, 501 U. S. at 868; *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015); *Lucia*, 138 S. Ct. at 2044.

In this case, ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Lucia*, 138 S. Ct. at 2048 (internal quotations omitted). These functions are all typically performed by Article III judges as well. The duties of an ALJ, as an "impartial adjudicator," distinguish the position from purely executive officer roles, which are subject to direct presidential removal. *Sutherland Bank*, 505 F.4th at 17.

Notably, virtually all of the enforcement actions brought in-house by the Bureau are resolved via a stipulation and consent order.[8] The consent orders are not signed by the ALJ—they are instead issued by the Bureau Director and are agreed to by the Respondent in the stipulation. The ALJ, as the impartial adjudicator, is not involved in the drafting of the consent order. Rather, through the settlement and negotiation process, which commonly occurs in civil actions brought before a federal trial court judge, the two parties are able to come to an agreement that dismisses the action without need for a decision by the ALJ.

This point should ease any concerns that the decisions of ALJs are merely rubber-stamped by the Director, to the point where most, if not all, enforcement actions are decided by the ALJ. *See Sutherland Bank*, 505 F.4th at 19 ("[M]any of the ALJ's legal and factual findings will go unreviewed on

[8] *See* Consumer Fin. Prot. Bureau, *supra* note 7. Out of the 163 in-house enforcement actions brought by the Bureau, over 150 have been resolved through a stipulation and consent order.

appeal simply due to the constraints inherent in reviewing a lower tribunal's decision."). Since there are a small number of cases where the ALJ actually issues a decision, the Director has more than enough time needed to properly evaluate the ALJ's proposal and offer their final decision as needed. And given that most end with a consent order, the Director, through the Bureau's enforcement team, is actively involved in resolving every case.

C. *Decker Coal*, Not *Free Enterprise Fund*, Provides the Proper Guidance on the Validity of the Dual-Removal Scheme

Given that the Bureau's ALJs are inferior officers that do not engage in policymaking and instead act as impartial adjudicators, the dual-removal scheme is appropriate here. In *Decker Coal*, the court held that a similar dual-removal scheme for ALJs at the Department of Labor (DOL) was constitutional. 8 F.4th at 1123. There, the DOL's ALJs were overseen and removable by the Benefits Review Board (BRB), who in turn were removable by the Secretary of Labor—the President's "alter ego." *Id.* at 1135 (quoting *Myers v. United States*, 272 U.S. 52, 133 (1926)) (internal quotations omitted). Because "the President has direct control over BRB members through the Secretary," the President could continue to "enjoy an ability to execute the laws." *Id.* (internal quotations and citations omitted).

In contrast, the Court in *Free Enterprise Fund* held that "dual for-cause limitations on the removal of Board members [who exercised executive powers] contravene[d] the Constitution's separation of powers." 561 U.S. at 492. These members were appointed by the Securities and Exchange Commission, not the President. *Id.* at 484. The Court determined such a structure "subvert[ed] the President's ability to ensure that the laws are faithfully executed." *Id.* at 498.

The situation here is analogous to *Decker Coal*, not *Free Enterprise Fund*. Bureau ALJs may only be removed for "good cause" after a determination by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(a). And in turn, members of the MSPB are directly removable by the President "for inefficiency, neglect, or malfeasance." 5 U.S.C. § 1202(d). Thus, members of the MSPB are not just

held responsible by the President's alter ego, as was the case in *Decker Coal*—they are under the direct supervision of the President.

Free Enterprise Fund, on the other hand, dealt with a dual-removal scheme for the members of the Board, who had "expansive powers to govern an entire industry" and were not merely "inferior Officers." 561 U.S. at 486. Here, ALJs are inferior Officers that do not have such expansive powers—their role is limited and of an adjudicatory nature. *See supra* Sections II.A-B. Additionally, the MSPB review process to remove an ALJ is "suitably deferential to the" Director, who is subject to the President's direct control. *Sutherland Bank*, 505 F.4th at 18. In *Free Enterprise Fund*, however, the Board members were subject to removal by the SEC Commissioners, who in turn were *not* subject to the President's direct control. 561 U.S. at 487.

Additionally, the Court of Appeals dissent relies extensively on the Fifth Circuit decision in *Jarkesy*, which held that "two layers of insulation . . . impede[] the President's power to remove ALJs." 34 F.4th at 465. But this reasoning is misguided. The dual-removal scheme strikes the right balance between the two competing interests present: (1) ensuring the independence of the arbiters and (2) allowing for some method of removal for accountability. Assume, arguendo, that the Director wanted to have an ALJ removed. The Director would need to enlist the MSPB to fulfill the request, but the Bureau would have to face the public scrutiny of such a decision. This restricts the President from directly interfering with the adjudication of UDAAP claims, protecting the integrity of the process, and results in a Board that is "accountable to the President, and a President who *is* [] responsible for the Board." *Contra Free Enter. Fund*, 561 U.S. at 495 (emphasis added). Accordingly, Petitioner's separation-of-powers claim must be denied.

CONCLUSION

For the aforementioned reasons, the Twelfth Circuit's decision should be affirmed.

Applicant Details

First Name	**Samuel**
Last Name	**Waranch**
Citizenship Status	**U. S. Citizen**
Email Address	**swaranch@pennlaw.upenn.edu**
Address	**Address** Street **1904 Pine St. Apt. 1** City **Philadelphia** State/Territory **Pennsylvania** Zip **19103** Country **United States**
Contact Phone Number	**9727429005**

Applicant Education

BA/BS From	**Oberlin College**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 20, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Pritchett, Wendell
pritchet@law.upenn.edu
Heaton, Paul
pheaton@law.upenn.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel I. Waranch
1904 Pine St. Apt. 1 Philadelphia, PA 19103 • (972) 742-9005 • swaranch@upenn.pennlaw.edu

May 25, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market St.
Philadelphia PA 19106

Dear Chief Judge Sanchez,

I hope you are well. I am writing to request your consideration of my application for a clerkship beginning in the fall of 2024 following a year of experience at a litigation-only law firm. Originally from Dallas, the grandson of Mexican immigrants and holocaust survivors, I am a recent graduate of the University of Pennsylvania Carey Law School.

Enclosed are my resume, transcript, and writing samples. Letters of recommendation from Professor Paul Heaton (pheaton@law.upenn.edu, 215-746-3353), Professor Regina Austin (raustin@law.upenn.edu, 215-898-5185), and Interim University President Wendell Pritchett (pritchet@law.upenn.edu, 215-898-7227) are also provided. The Honorable Michael A. Shipp, of the District of New Jersey, and his career clerk, Frances Huskey, can also be reached as references at 609-989-2009. Please let me know if any additional references or information is needed.

Sincerely,

Samuel I. Waranch

Samuel I. Waranch

1904 Pine St. Apt. 1, Philadelphia, PA 19103 • 972-742-9005 • swaranch@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, *Philadelphia, PA* May 2023
J.D.
Honors: *University of Pennsylvania Law Review*, Senior Editor
The Milton C. Sharp Award, graduating honors for highest grades in property and land-use related coursework
Activities: Criminal Law with Professor Paul Heaton, Teaching Assistant
Custody and Support Assistance Clinic, Legal Advocate
Intramural Mock Trial, Participant
First Generation Professionals, Member
Penn Law Ultimate Frisbee, Founder and Co-President

Oberlin College, *Oberlin, OH* May 2019
B.A., Political Science
Honors: Dean's Fellowship, Cole Scholar in Electoral Politics
Activities: Oberlin College Chess Team, Captain of Team, Three-Time "Small College" National Champion, Ultimate Frisbee "A" Team

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, *New York, NY* Summer 2022
Summer Associate
- Assisted in drafting pleadings for complex commercial and criminal cases.
- Researched novel legal questions, prepared memoranda to aid supervising attorney, and assisted with ongoing investigations.

Federal Community Defender Office, Eastern District of Pennsylvania, *Philadelphia, PA* Fall 2021
Extern, Capital Habeas Unit
- Drafted and edited portions of habeas petitions in capital cases.
- Wrote memoranda addressing discreet legal questions to support supervising attorneys.

United States District Court, District of New Jersey, *Trenton, NJ* Summer 2021
Judicial Intern, Hon. Michael A. Shipp
- Drafted opinions for a variety of civil and criminal cases and edited pending opinions.
- Served collaboratively on trial teams to brief the judge on motions in limine and synthesize points of dispute.

National Museum of American Jewish History, *Philadelphia, PA* Spring 2020
Academic Liaison Intern
- Assisted in the creation and implementation of seasonal academic initiatives.
- Interviewed and recruited prospective summer interns.

Varsity Tutors, *Philadelphia, PA* September 2019 – August 2020
LSAT Tutor
- Tutored the LSAT to aspiring law students in-person and online and developed individually tailored curricula.
- Served as a pro-bono tutor to prospective law students from underserved backgrounds.

INTERESTS

Chess; Ultimate Frisbee; Cooking

Penn Law Transcript

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Paul Heaton	A-	4	Recommender
Civil Procedure	Tobias Barrington Wolff	B+	3	
Contracts	Jean Galbraith	B+	3	
Legal Practice Skills	Jessica Simon	Credit	3	
Legal Practice Skills (Cohort)	Conor Ferrall	Credit	N/A	

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Land Use Law	Wendall Pritchett	A	3	Recommender
Law and Society in Japan	Eric Feldman	A-	3	
Torts	Jacques DeLisle	B+	4	
Constitutional Law	Seth Kreimer	B+	4	
Legal Practice Skills	Jessica Simon	Credit	3	
Legal Practice Skills (Cohort)	Conor Ferrall	Credit	N/A	

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Land Use in Practice	Thomas Witt	A	2	
Visual Legal Advocacy	Regina Austin	A	2	Recommender
Appellate Advocacy	Matthew Duncan	B+	3	
Federal Defenders Office Externship – Capital Habeas Unit	N/A	Credit	6	
Law Review	N/A	Credit	1	

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Private Action: Antitrust, Rico, and Class Action	Howard Langer	A	3	
Visual Legal Advocacy	Regina Austin	A	2	Recommender
Evidence	David Rudovsky	B+	4	
Business Management (Wharton)	Rahul Kapoor	Credit	3	
Teaching Assistant – Criminal Law	Paul Heaton	Credit	2	Recommender
Law Review	N/A	Credit	1	

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Thinking Like a Litigator	Stephen McConnel	A	3	
Professional Responsibility	Diana K. Ashton	A	2	
Federal Courts	Jean Galbraith	B+	4	
Cybercrime	Michael Levy	B+	3	

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intersection Between American and Jewish Law	Nomi Stolzenberb	A	3	
Writing About the Law	Kermit Roosevelt	A-	3	
Corporations	Michael Knoll	B+	3	
Litigation Finance	Tom Baker	B+	3	
Army War College	Michael Knoll	Credit	2	

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Samuel Waranch

Dear Judge Sanchez:

I write regarding Sam Waranch, who has applied to your office for a clerkship. Sam is an exceptionally strong student, among the best in his class. He would make an excellent clerk and serve your chambers well. I endorse him enthusiastically and urge you to hire him.

I had the pleasure to teach Sam in my first-year class Land Use Law and Policy. Even though the class was online due to COVID, it was a very engaged experience, and Sam was one of the most thoughtful participants. Sam was active our discussions, and his comments made significant contributions. Sam has deep interest in government, and he frequently drew upon his interests and experiences to advance our conversations. His approach to the cases and other materials was particularly rigorous and his analysis consistently creative.

My land use class is a writing intensive one, requiring two papers. Sam's were among the very top in the class. He is a strong, thorough, and thoughtful writer. In his final paper for the class, Sam wrote an excellent analysis of the rules of street access and the constant tensions among the many different users of the streets (residents, businesses, pedestrians and cars being the most active). Sam adeptly wove class materials, primary research, and policy analysis to produce a paper that makes meaningful recommendations for legal reform to mediate these tensions. I was very impressed. As you can see from Sam's transcript, his performance in the law school has been very strong. He is one of the very best students in what the Dean has described as one of the strongest classes in the school's history.

In addition to his scholarly accomplishments, Sam has a deep commitment to public service, and he is active in several law school organizations. Sam is a leader of the law school chapter of the American Constitution Society as well as our high school Mock Trial program, supporting students in learning about our litigation system and developing the critical skills of analysis and oral presentation. Sam spent his 1L summer interning for Judge Michael Shipp, where he received excellent training and further developed his research and writing skills. He will come to your office ready to contribute on his first day.

Sam's passion for public service was developed long before he arrived at Penn. During his college years, he was active in many political and public service activities. Outside of class, I have discussed issues of public policy with him. Sam has spent a great deal of time thinking about the role of government and lawyers in American society, and he has nuanced views on many current issues. I expect Sam to make major contributions to the field of public interest law.

Through several encounters outside of class, I have gotten to know Sam. He is a warm and thoughtful person. He is hard-working, unassuming, supportive of others and clearly well-respected by his peers. I believe that Sam will be a leader in whatever field of law he chooses, and I expect to be bragging about him for years to come. You could not pick a better person for your office.

Please don't hesitate to contact me if I can provide any additional information.

Sincerely,

Wendell E. Pritchett, J.D., Ph.D.
Presidential Professor of Law and Education
pritchet@law.upenn.edu
215-898-7483

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Samuel Waranch

Dear Judge Sanchez:

I am a faculty member at the University of Pennsylvania Carey Law School and am writing this letter in support of Sam Waranch, who is applying for a clerkship. Sam was a 1L student in my criminal law course in 2020 and he worked as a teaching assistant (TA) for me for the same course in 2022. If you are looking for a clerk who is does high-quality work and is a great team player, Sam would be a great choice. I enthusiastically recommend him.

I approached Sam to work for me as a TA because he was among the top students when he took my course as a 1L. In addition to demonstrating mastery of the class material, Sam also was a consensus-builder in group discussions and prioritized listening to others over pushing out his own views. During his time as a TA, Sam teamed with two other TAs, and he again demonstrated his others-first approach to collaborative work, exhibiting an admirable flexibility and willingness to adapt his efforts to the needs of the group. If there was an assignment that one of the other TAs had a conflict with or didn't feel comfortable completing, Sam was happy to step in to make sure the work was done. He was also responsive to feedback and genuinely interested in identifying ways he could improve and become a better team member.

In addition to doing the normal TA tasks of curating class notes, leading review sessions, and meeting with students, Sam organized and led two supplementary lectures during the term—one summarizing recent empirical studies on prosecutor charging decisions in criminal cases, and another discussing the habeas process in death penalty cases. For the former lecture, he fielded an online survey that provided police reports on a case and asked class members to report how they would charge the case; Sam collected student responses in advance and then compared them to the actual responses of hundreds of prosecutors who completed a similar exercise in a published research study. It was an innovative way to present this material that really engaged the students and got them talking about how prosecutors should and do perform their work. Indeed, the author of the original study on which Sam based his lecture (a professor at another university) requested Sam's lecture materials once she heard about this creative way that he found to present the material.

One thing I particularly appreciated about both of Sam's lectures is that he took the time to explain, before he got into the substantive content of the discussion, the why of what we were learning by clearly outlining for the students how the particular content we would discuss could be useful in their future careers, whether or not they chose to pursue criminal work. Sam's big-picture, strategic way of thinking about the world was more broadly evident in my interactions with him. For example, when we'd talk about a lecture or other assignment, Sam was always very thoughtful about making sure he first clearly understood the end goal we were trying to further through the work before getting into the details of the task. This allowed him to make sure he was closely aligning his day-to-day activities with the broader vision I had for our students' growth throughout the semester.

To summarize, Sam is smart, easy to get along with, and flourishes in a team setting. He will be an excellent clerk and will make a meaningful contribution to any chambers. If you have any questions about Sam or if I can be of further assistance, please don't hesitate to reach out to me.

Warmly,

Paul Heaton
Senior Fellow and Academic Director
Quattrone Center for the Fair Administration of Justice
pheaton@law.upenn.edu
215.746.3353

Samuel I. Waranch
1904 Pine St. Apt. 1 Philadelphia PA, 19103 • (972) 742-9005 • swaranch@upenn.pennlaw.edu

Writing Sample: Cover Sheet

The attached writing sample represents my final version of an opinion. I wrote it during my first-year summer judicial internship. To preserve confidentiality, citations to the record, the parties' names, dates, and the judge's name have been changed. I conducted all the research for this assignment independently; the writing is mine alone.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBIN'S RESTAURANT, INC. Plaintiff, v. WESTERN INSURANCE GROUP, Defendant.	Civil Action No. 21-12345 (KMJ) **DRAFT OF MEMORANDUM OPINION**

JONES, District Judge

This matter comes before the Court upon Defendant Western Insurance Group's ("Defendant") Motion to Dismiss Plaintiff Robin's Restaurant ("Plaintiff") Complaint. (ECF No. 4.) Plaintiff opposed (ECF No. 8), and Defendant replied (ECF No. 12). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Rule 78.1. For the reasons set forth herein, Defendant's Motion to Dismiss is granted.

I. BACKGROUND

This case is one of many emerging COVID-19-related insurance disputes. Plaintiff owns and operates a chain of sit-down restaurants throughout New Jersey. (Complaint ¶ 11, ECF No. 1.) Defendant is an insurance company based in New York. (*Id.* ¶ 12.) From July 15, 2019, to July 15, 2020, Defendant insured Plaintiff for business interruption losses, including "business personal property, business income and extra expense, [and] contamination coverage," through their insurance policy (the "Policy"). (*Id.* ¶ 18.) According to Plaintiff, "[t]he Policy is an all-risk policy,

insofar as it provides that covered perils under the policy means physical loss or physical damage unless the loss is specifically excluded or limited in the Policy." (*Id.* ¶ 24.)

On March 9, 2020, New Jersey Governor Phil Murphy "issued a Proclamation of Public Health Emergency and State of Emergency, the first formal recognition of an emergency situation in the State of New Jersey as a result of COVID-19." (*Id.* ¶ 52.) Shortly thereafter, Governor Murphy issued orders requiring non-essential businesses to cease operations and close all physical locations followed by a Stay-at-Home Order for all residents of New Jersey. (*Id.* ¶ 55.) These orders required the closure of the "brick-and-mortar premises of all non-essential retail businesses . . . as long as th[e] Order remains in effect." (*Id.* ¶ 56.) Plaintiff complied with these orders and suspended its operations. (*Id.* ¶ 59.) Plaintiff alleges that its "compliance with these mandates resulted in [it] suffering business losses, business interruption[,] and extended expenses of the nature that the Policy covers and for which [its] reasonable expectation was that coverage existed in exchange for the premiums paid." (*Id.* ¶ 61.)

Plaintiff, subsequently, submitted a claim for business losses pursuant to the Policy, but Defendant rejected the claim. (*See generally* Claim Denial Letter, ECF No. 2-8.) On November 14, 2020, Plaintiff filed the instant four-count action against the Defendant. (*See generally* Complaint.) Count One asserts a claim for declaratory relief. Plaintiff argues that Governor Murphy's orders trigger coverage under the policy and that "the Policy provides coverage to Plaintiff for any current and future closures of businesses such as Plaintiff's due to physical loss or damage and the policy provides business income coverage in the event that a loss or damage at the Insured Properties has occurred." (*Id.* ¶¶ 68, 73.) Counts Two through Four assert claims for breach of contract based on Defendant's denial of coverage under the Policy's Business Income, Extra Expense, and Civil Authority Endorsements. (*Id.* ¶¶ 83-108.)

II. LEGAL STANDARD

Rule 8(a)(2)[1] "requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

When analyzing a Rule 12(b)(6) motion to dismiss, the district court conducts a three-part analysis. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Second, the court must accept as true all of a plaintiff's well pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). The court, however, may ignore legal conclusions or factually unsupported accusations that merely state "the-defendant-unlawfully-harmed-me." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Finally, the court must determine whether the "facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler*, 578 F.3d at 211 (quoting *Iqbal*, 556 U.S. at 679). A facially plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 210 (quoting *Iqbal*, 556 U.S. at 678). On a motion to dismiss for failure to state a claim, the "defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

III. DISCUSSION

Both Plaintiff and Defendant agree that New Jersey law controls in this case. The question at issue here is the proper interpretation of the Policy. Under New Jersey Law, the

[1] All references to a "Rule" or "Rules" hereinafter refer to the Federal Rules of Civil Procedure.

interpretation of a contract is a question of law. *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284, 288 (3d Cir. 2004). In the instant case, Defendant's "All-Risk" Policy does not contain a "virus exclusion" which this court and others in the district have routinely enforced as barring coverage for COVID-19 related claims. *See Quakerbridge Early Learning LLC v. Selective Ins. Co. of New England*, 2021 WL 1214758, at *4 (D.N.J. Mar. 31, 2021); *Benamax Ice, LLC. v. Merch. Mut. Ins. Co.*, 2021 WL 1171633, at *4 (D.N.J. Mar. 29, 2021); *Chester C. Chianese DDS LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 1175344, at *1 (D.N.J. Mar. 27, 2021). The Court's job is thus to interpret the Policy to determine if coverage is appropriate in the absence of such an exclusion.

In interpreting insurance contracts under New Jersey Law, the state has routinely held that "[a]n insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." *Flomerfelt v. Cardiello*, 997 A.2d 991, 996 (N.J. 2010). "In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285, 1289 (N.J. 2008). "If the language is clear, that is the end of the inquiry." *Id.* "If the plain language of the policy is unambiguous," the Court should not engage in a strained analysis to "support the imposition of liability or write a better [contract] . . . than the one purchased." *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 129 A.3d 1069, 1075 (N.J. 2016) (quoting *Chubb*, 948 A.2d at 1289). Finally, "[e]xclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.'" *Flomerfelt*, 997 A.2d 991, 996 (N.J. 2010) (quoting *Princeton Ins. v. Chunmuang*, 698 A.2d 9, 17 (N.J. 1997)). Plaintiff's breach of contract and declaratory judgment claims thus require it to establish that they are "entitled to coverage

within the basic terms of the [Policy]." *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021) (internal quotations and citation omitted).

The parties dispute the proper interpretation of the Policy whose coverage is triggered by "direct physical loss of or damage to" the covered properties. The Business Income endorsement explains that,

> [w]e will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' The 'suspension' must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

(Policy *52.) Similarly, the Extra Expense Endorsement states that "Extra Expense means reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." (*Id.* at *53.) The Civil Authority Provision likewise conditions coverage on "direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss." (*Id.* at *79.)

Plaintiff alleges breach of contract for Defendant's denial of coverage for its COVID-19 related losses under either the Business Income, Extra Expense, or Civil Authority endorsements of the Policy. Defendant challenges coverage under these endorsements.

A. Loss of Use of Covered Property Stemming from Government Orders Does Not Constitute Direct Physical Loss or Damage.

A plain reading of the unambiguous language of the Policy reveals that coverage is conditioned for "physical loss of or damage" to covered property caused by or resulting from a "Covered Cause of Loss." Plaintiff alleges that orders preventing use of their covered properties

amounts to physical loss or damage because of COVID-19 or the apparent future threat of it. (Comp. ¶¶ 27, 35, 59-60.)

In the instant case, Plaintiff's complaint fails to allege specific COVID-19 contamination. When the "[c]omplaint lacks any allegations about the existence of anything affecting the physical condition of its premises . . . its losses are a loss of use untethered from the physical condition of the property itself." *TAQ Willow Grove, LLC. v. Twin City Fire Ins.*, 2021 WL 131555, at *5 (E.D. Pa. Jan. 14, 2021); *See also SSN Hotel Mgmt., LLC. v. Harford Mut. Ins. Co.*, No. 20-6228, 2021 WL 1339993, at *4 (E.D. Pa. Apr. 8, 2021). "[T]hese allegations are insufficient." *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 20-010167, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021); *See also Mac Prop. Grp. LLC. v. Selective Fire & Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *8–9 (N.J. Super. Ct. Nov. 5, 2020) (finding "no direct physical loss or damage to property" resulting from an "order of civil authority" addressing COVID-19).

As more and more courts deal with COVID-19 related insurance claims, the consensus that has emerged in this circuit is that the loss of use of covered properties stemming from a civil authority order is insufficient to cause direct physical loss or damage. In *Port Authority of New York and New Jersey*, the third circuit addressed the interpretation of the phrase "direct physical loss or damage" under New Jersey law in the context of insurance claims for asbestos damage. *See Port Auth. Of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002). The Court concluded that physical damage to property meant "distinct, demonstrable, and physical alteration of its structure." *Id.* (quoting 10 Couch on Ins. §148:46 (3d ed. 1998)). Damages by things unnoticeable to the naked eye must meet a higher standard than those that can easily damage a building. *Id.* at 235.

The line of cases Interpreting *Port Authority* in the context of COVID-19 related insurance disputes clearly "are instructive on whether the threat of COVID-19 constitutes 'direct physical loss or direct physical damage to property.' These [recent] decisions have **almost uniformly concluded that such a threat does not trigger insurance coverage**." *Hair Studio 1208, LLC v. Hartford Underwriters Insur. Co.*, No. 20-2171, 2021 WL 1945712, at *7 (E.D. Pa. May 14, 2021) (emphasis added); *See*, e.g., *Id.; Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 20-010167, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, No. 20-5271, 2021 WL 1210000, at *5–6 (E.D. Pa. Mar. 31, 2021); *Chester Cty. Sports Arena v. The Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 1200444, at *7 (E.D. Pa. Mar. 30, 2021).

In response to Defendant's motion to dismiss, Plaintiff cites out of circuit decisions to support the proposition that "a condition that renders property unsuitable for its intended use constitutes a direct physical loss" (Pl.'s Opp'n Br. *13). Plaintiff alleges that even "fear of damage can be a direct physical loss." (*Id.*) To support this, Plaintiff solely cites *Studio 417*. *See Studio 417 Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020); (Pl.'s Opp'n Br. 14, 16, 19.) The vast majority of cases that have emerged since *Studio 417* have explicitly rejected this this approach. *See, e.g., Zwillo V, Corp. v. Lexington Insur. Co.*, 504 F. Supp. 3d 1034 (W.D. Mo. Dec. 02, 2020); *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 2021 WL 147139, at *6–7 (W.D. Pa. Jan. 15, 2021). The Court will not deviate from the recent line of reasoning employed in this circuit and fails to find coverage stemming from Plaintiff's "loss of use" of covered properties.

B. Plaintiff Has Failed to Allege that COVID-19 Has Caused Direct Physical Loss or Damage to Covered Properties.

Plaintiff alternatively contends that their covered restaurants have experienced a covered cause of loss from direct COVID-19 contamination because "Plaintiff alleges that its insured property is at imminent risk of coronavirus contamination, or it may have already been contaminated and that surrounding property has been contaminated." (Pl.'s Opp'n Br. 18-19, Complaint ¶¶ 27, 56-59.) Plaintiff argues that "clear evidence of the coronavirus being present throughout the state, its presence in and around Plaintiff's insured properties, and the severe safety risks associated with allowing individuals to come in[to]" close contact with one another is sufficient to warrant a finding that COVID-19 has damaged the covered properties. (Reply 19, Complaint ¶¶ 58-59.)

In its complaint, however, Plaintiff never offers specific factual allegations about COVID-19 damaging its restaurants or other properties near its restaurants. In fact, "[p]laintiff does not seek any determination whether the Coronavirus is physically in or at the Insured Properties" (Complaint ¶ 70.) Plaintiff instead alleges that its premises are unsafe solely because of the inevitability of individuals being near one another. (Comp. ¶ 60.)

Plaintiff's conclusory allegations, relying on the pervasiveness of COVID-19 throughout New Jersey, are insufficient to trigger coverage under the Business Income, Extra Expense, or Civil Authority Endorsements and survive a 12(b)(6) motion. This is because "[e]ach of the coverage provisions Plaintiff relies on specifically require 'direct physical loss or damage' to trigger the Policy . . . Plaintiff has not alleged any facts that support a showing that its property was physically damaged.". *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 7338081, *2 (D.N.J. Dec. 14, 2020). This Court agrees with the *Boulevard Carroll* Court and fails to find a sufficient factual basis to conclude that its covered properties suffered a loss

caused directly from COVID-19 contamination or, in the case of the Civil Authority Endorsement, to surrounding property.

However, even if Plaintiff properly alleged the existence of COVID-19 contamination at covered properties, this would not be enough to support coverage under the Policy. This is because "the presence of a virus that harms humans but does not physically alter structures does not constitute coverable property loss or damage." *7th Inning Stretch LLC v. Arch Ins. Co.*, 2021 WL 1153147, at *2 (D.N.J. Mar. 26, 2021); *See also Handel v. Allstate Ins. Co.*, 2020 WL 645893, at *3 (E.D. Pa. Nov. 6, 2020) (relying on *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002)) (noting that physical loss or damage requires "that the functionality of the property 'was nearly eliminated or destroyed' or the 'property was made useless or uninhabitable'".) Plaintiffs' claims, even if properly plead, would still be insufficient.

The Court is sympathetic to the plight of business owners in the wake of the COVID-19 pandemic; however, it will not deviate from the weight of authority in construing identical contract language to "rewrite the contract for the benefit of either party." *Del. Valley Plumbing*, 2021 WL 567994, at *7. The Court, accordingly, grants Defendants' Motion to Dismiss.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is granted. The Court will enter an Order consistent with this Memorandum Opinion.

Applicant Details

First Name	**Wesley**
Last Name	**Ward**
Citizenship Status	**U. S. Citizen**
Email Address	**wesleybward@gmail.com**
Address	**Address** Street **308 Packard St. Apt. 6** City **Ann Arbor** State/Territory **Michigan** Zip **48104** Country **United States**
Contact Phone Number	**3098303879**

Applicant Education

BA/BS From	**Illinois State University**
Date of BA/BS	**May 2017**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Michigan Journal of Law Reform**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Global Antirutst Institute Moot Court** **Campbell Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy**

Recommenders

Mortenson, Julian
jdmorten@umich.edu
734-763-5695

Salim, Oday
osalim@umich.edu
7347637087

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a third-year law student at the University of Michigan, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term.

I am a competitive distance runner and a Type 1 diabetic. Balancing the rigors of law school with training and managing a chronic illness has taught me to be highly organized, diligent, and resourceful. These traits allowed me to succeed in my jobs before law school, where working as a legislative assistant and in political advertising, I utilized my ability to adjust to sudden changes and take ownership of large projects.

My internships with the Consumer Protection Bureau of the New York Attorney General's Office and the National Consumer Law Center have strengthened my desire to be a public interest litigator. After law school, I will clerk in the U.S. Bankruptcy Court for the District of Delaware for Judge Craig T. Goldblatt. There, I hope to improve my legal research skills, engage with cutting-edge corporate bankruptcies, and gain experience with complicated commercial litigation that affects consumers. A further clerkship in your chambers will allow me to further refine my writing skills and immerse myself in a wider range of legal issues.

I have attached my résumé, transcripts, writing sample, and letters of recommendation from the following professors:

- Professor Julian Mortenson: jdmorten@umich.edu, (734) 763-5695; and
- Clinincal Professor Oday Salim: osalim@umich.edu, (586) 255-857.

Thank you for your time and consideration.

Sincerely,

Wesley B. Ward

Wesley B. Ward

308 Packard Street, Apartment 6, Ann Arbor, Michigan 48104
(309) 830-3879 • wbward@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, Michigan
Juris Doctor — May 2023
Journal: Michigan Journal of Law Reform, *Executive Editor*, Vol. 56
Activities: Research Assistant to Professor John A.E. Pottow; Global Antitrust Institute Moot Court Competition, *Quarterfinalist* (2023); Henry M. Campbell Moot Court Competition, *Participant* (2022), *Marshal* (2020-21); Environmental Law and Sustainability Clinic at Michigan Law (2022)

ILLINOIS STATE UNIVERSITY — Normal, Illinois
Bachelor of Science in Finance, *summa cum laude* and *Bachelor of Arts* in Political Science, *summa cum laude* — December 2017
Honors: Student Laureate of The Lincoln Academy of Illinois (2017) (one student honored from each Illinois university)
Robert G. Bone Scholarship (2017) (top academic honor at Illinois State)
Activities: Division I Cross-Country/Track & Field; Department of History Research Assistant

EXPERIENCE

U.S. BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE — Wilmington, Delaware
Incoming Law Clerk for the Honorable Craig T. Goldblatt — September 2023 – September 2024

OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA — Washington, D.C.
Pro Bono Research Lead — November 2022 – Current

- Directed a team of four Michigan Law students in researching and writing a substantive memo for the Office of Consumer Protection and coordinated our progress with supervisors in the District of Columbia and California.

NATIONAL CONSUMER LAW CENTER — Boston, Massachusetts
Summer Intern — May 2022 – August 2022

- Wrote articles addressing emerging legal theories to tackle problems faced by Fair Debt Collection Practices Act plaintiffs in gaining access to federal courts.
- Analyzed over 1,200 complaints from the Consumer Financial Protection Bureau's database regarding consumers' difficulties with rental debt collectors, culminating in drafting a 20-page white paper for NCLC.

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL — New York, New York
Summer Intern, Consumer Frauds and Protection Bureau — June 2021 – July 2021

- Researched complex legal issues and drafted memoranda in preparation for litigation against small business loan providers and automobile loan providers engaged in illegal conduct.
- Analyzed and summarized materials provided by whistleblowers in an investigation of a for-profit college, and drafted document requests sent to the target of that investigation.

STATE OF ILLINOIS — Springfield, Illinois
Legislative Assistant to State Senator Ram Villivalam — November 2019 – August 2020

- Coordinated Senator Villivalam's capitol activities including filing legislation and meetings with stakeholders.
- Educated constituents on the latest local, state, and federal agency programs to help working people and small businesses during the pandemic-related economic downturn.

THREE POINT MEDIA — Chicago, Illinois
Production Assistant — May 2018 – December 2018

- Produced television advertisements for political campaigns with budgets from $100 thousand to over $25 million, including high-profile congressional, and gubernatorial campaigns in a high-pressure environment.

ADDITIONAL

Interests: Competitive marathon running and Type 1 Diabetes advocacy.
Volunteer: United Community Housing Coalition (2020-21), ALS Association (2019), The Immigration Project (2017).

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Ward,Wesley Barnes
Student#: 44896496

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020			**(August 31, 2020 To December 14, 2020)**					
LAW	510	002	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	B+
LAW	520	004	Contracts	Nicolas Cornell	4.00	4.00	4.00	B+
LAW	530	001	Criminal Law	David Moran	4.00	4.00	4.00	B+
LAW	593	008	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	S
LAW	598	008	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	S
Term Total				**GPA: 3.300**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.300**		**12.00**	**15.00**	
Winter 2021			**(January 19, 2021 To May 06, 2021)**					
LAW	540	001	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	A-
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	A-
LAW	580	001	Torts	Roseanna Sommers	4.00	4.00	4.00	B+
LAW	594	008	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	S
Term Total				**GPA: 3.566**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.433**		**24.00**	**29.00**	

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Control No: E196912401 Issue Date: 06/06/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Ward,Wesley Barnes
Student#: 44896496

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	637	001	Bankruptcy	John Pottow	4.00	4.00	4.00	A-
LAW	675	001	Federal Antitrust	Daniel Crane	3.00	3.00	3.00	A
LAW	741	004	Interdisc Prob Solv Identity Theft: Causes and Countermeasures	Barbara Mcquade Bridgette Carr Florian Schaub	3.00	3.00	3.00	A
LAW	768	001	21st C. Infrastr/Lawyer's Role	Andrew Doctoroff	2.00	2.00	2.00	A
LAW	885	001	Mini-Seminar American Ecological Writings	Nicolas Cornell	1.00		1.00	S
LAW	900	133	Research	Barbara Mcquade	2.00	2.00	2.00	A
Term Total				**GPA: 3.914**	**15.00**	**14.00**	**15.00**	
Cumulative Total				**GPA: 3.610**		**38.00**	**44.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	A
LAW	803	001	Advocacy for Underdogs	Andrew Buchsbaum	2.00	2.00	2.00	A
LAW	930	001	Envt'l Law & Sustain Clinic	Oday Salim	4.00	4.00	4.00	A-
LAW	931	001	Envt'l Law & Sustain Clnc Sem	Oday Salim	3.00	3.00	3.00	A-
Term Total				**GPA: 3.838**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.668**		**51.00**	**57.00**	

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Control No: E196912401 Issue Date: 06/06/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Ward,Wesley Barnes
Student#: 44896496

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	483	001	Judicial Clerkships	Kerry Kornblatt	2.00	2.00	2.00	A-
LAW	669	001	Evidence	Richard Friedman	4.00	4.00	4.00	A
LAW	677	001	Federal Courts	Leah Litman	4.00	4.00	4.00	B+
LAW	867	001	Antitrust and Democracy	Daniel Crane	2.00	2.00	2.00	A-
LAW	885	008	Mini-Seminar Lawyering in Washington, DC	Chris Walker	1.00		1.00	S
Term Total				**GPA: 3.666**	**13.00**	**12.00**	**13.00**	
Cumulative Total				**GPA: 3.668**		**63.00**	**70.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A
LAW	815	001	Public Law Workshop	Julian Davis Mortenson Chris Walker	2.00	2.00	2.00	A
LAW	854	001	Anti-corruption Law & Practice	Chavi Nana	2.00	2.00	2.00	A
LAW	886	008	Mini-Seminar II Lawyering in Washington, DC	Chris Walker	0.00		0.00	S
LAW	900	220	Research	John Pottow	1.00	1.00	1.00	A+
Term Total				**GPA: 4.020**	**15.00**	**15.00**	**15.00**	
Cumulative Total				**GPA: 3.735**		**78.00**	**85.00**	

End of Transcript
Total Number of Pages 3

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499